(1)

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

Case No. 06 1198

NOV 22 2006
OFFICE OF THE CLERK

In Re FRANK MORROW JR., *Petitioner*

FRANK MORROW JR.,

Plaintiff- Petitioner

v.

CITY OF OAKLAND, et al.

Defendants-Respondents

v.

CITY OF OAKLAND, and DENNIS ROBERTS, et al.

Defendants-Respondents

PETITION FOR WRIT OF MANDAMUS

Frank Morrow Jr.
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QUESTIONS PRESENTED FOR REVIEW

In a case where a Plaintiff alleges state and federal causes of action, and the presiding district court judge determines that Plaintiff has no federal cause, does 28 U.S.C.§1447 impose a non-discretionary, self- executing duty on the judge to remand the case to state court prior to ordering enforcement of a disputed agreement?

When facts indicate that a district court judge's impartiality might reasonably be questioned, does 28 U.S.C. §455 impose a non-discretionary, self-executing duty on the judge to recuse herself?

Parties to Petitioner's first case- *Morrow v. City of Oakland,* District Court No. C-04-00315- Circuit Court No. 05-15499

Oakland California Police Officer Frank Morrow Jr. – Plaintiff- Petitioner

City of Oakland Chief of Police Richard Word- Respondent

City of Oakland Deputy Chief of Police Peter Dunbar- Respondent

City of Oakland Captain of Police Jeff Israel- Respondent

City of Oakland Lieutenant of Police Anthony Rachal- Respondent

City of Oakland Sergeant of Police Jeff Wood- Respondent

City of Oakland Sergeant of Police Peter Lau- Respondent

City of Oakland Mayor Jerry Brown- Respondent

City of Oakland City Manager Robert Bobb- Respondent

City of Oakland Human Resources Manager Michael Rich- Respondent

City of Oakland Human Resources Manager Stephanie G. Sierra- Respondent

City of Oakland City Council President Ignacio De La Fuentes- Respondent

City of Oakland City Council Member Jane Brunner- Respondent

City of Oakland City Council Member Danny Wan- Respondent

City of Oakland City Council Member Nancy Nadel- Respondent

City of Oakland City Council Member Jean Quan- Respondent

City of Oakland City Council Member Desley Brooks- Respondent

City of Oakland City Council Member Larry Reid- Respondent

City of Oakland City Council Member Henry Chang- Respondent

City of Oakland City, a municipal corporation, and public entity

Parties to Petitioner's second case- *Morrow v. City of Oakland*, District Court No. C-05-00270- Circuit Court No. 05-17061

Oakland California Police Officer Frank Morrow Jr.- Plaintiff-Petitioner

Oakland City Attorney John Russo- Respondent

Assistant Oakland City Attorney Randolph Hall- Respondent

Deputy Oakland City Attorney James Hodgkins- Respondent

John Verber, Attorney at Law- Respondent

Claudia Leed, Attorney at Law- Respondent

Dennis Roberts- Attorney at Law- Respondent

Paul Robert Turley, Attorney at Law- Respondent

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PRIOR OPINIONS

The content of the original unpublished 9th Circuit Court of Appeals Opinions whose review are sought are reproduced in the Appendix at F and H. The content of the challenged District Court Orders are reproduced in Appendix B, D, and E.

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on August 28, 2006 by the Ninth Circuit Court of Appeals. This petition is timely filed in compliance with 28 U.S.C § 2101 (c) because it was mailed within ninety days of August 28, 2006, the date a petition for rehearing was denied by the Circuit Court.

Jurisdictional basis for this Court is 28 U.S.C § 1651(a) and Fed. Rule of App. P. 21(a).

CONSTITUTIONAL PROVISIONS

Amendment XIV section 1, of the United States Constitution in pertinent part provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

In pertinent part, Title 28USC §1447 (c) states:

" if at any time before final judgment it appears that a district court lacks subject matter jurisdiction the case shall be remanded."

In pertinent part, Title 28 USC §455 (a) states:

" any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

In pertinent part, Title 18 USC §241 states:

" If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;...They shall be fined under this title or imprisoned not more than ten years, or both....."

I. STATEMENT OF THE CASE

Petitioner, Frank Morrow Jr., an Oakland California Police Officer was a plaintiff in two lawsuits against defendant City, and various named City officials.

In August 2003, Petitioner filed a civil complaint for damages against the City of Oakland and city officials.

Petitioner's first suit was brought under 42 U.S.C. §1983. In the first suit, Petitioner alleged city officials violated his due process rights and routinely violate the due process rights of aggrieved Oakland Police Officers by maintaining and employing written and unwritten policies

inconsistent with California Government Codes 3303 and 3304(b), which allow aggrieved officers to receive a *"name clearing"* hearing to challenge adverse entries placed in their personnel files. Petitioner alleged that the City's practice constitutes an infirmed pattern, and practice of violating the 14th Amendment rights of Oakland Police Officers .

In addition, Petitioner, a readily identifiable African American alleged that he was subjected to disparate treatment in violation of Title VII of the 1964 Civil Rights Act, and also that the disciplinary system of the Oakland Police Department has a disparate impact on City's minority police officers, particularly those of African, and Latin American descent. Petitioner also joined various state law claims, including but not limited to City's abject failure to comply with California Government Code 3304(b).

The first complaint asserts the following facts:

Petitioner was subjected to an internal police investigation after being subjected to a false and retaliatory complaint by *Griselvia Castaneda,* a woman Petitioner lawfully arrested for public intoxication, assault, and resisting arrest, while acting in his capacity as an Oakland Police Officer. *Castaneda* falsely accused Petitoner of attempting to sexually assault her while in Petitioner's custody.

The Oakland Police Department's internal investigation was conducted in violation of departmental policies, and in violation of a recent consent decree the department entered. *Delphine Allen v. City of Oakland,* C00-4599TEH. (i.e. although mandated to, the I.A. investigators failed to consider all relevant circumstances, failed to give weight to exculpatory evidence, as well as circumstantial evidence that was in

Petitioner's favor). The flawed police internal investigation resulted in a flawed result and adverse inferences suggesting that Petitioner was guilty of attempting a crime of moral turpitude. The results were placed in Petitioner's permanent personnel records. Under California Government Code 3303, the adverse entries constituted a *"punitive"* act which Petitioner was entitled to challenge under California Government Code 3304(b).

Petitioner timely filed an employment grievance invoking his rights under California Government Code 3304(b) and requested an administrative due process *"name clearing hearing."* The parties named in Petitioner's first complaint refused to grant Petitioner the *"name clearing hearing."* The district court record reflects that the City knowingly violated Petitioner's due process rights under California Government Code 3304(b)[1] thereby giving rise to Petitioner's claim that City officials engaged in violations of Title 18 § 241 USC.

The first complaint asserts the following concerning the Oakland City Attorney's Office handling of Petitioner's defense in the *Castaneda* case

Castaneda filed a civil suit against Petitioner and the City of Oakland after pleading " No Contest" to charges that Petitioner arrested her for.

In violation of Petitioner's due process rights, officials in the Oakland City Attorney's Office accepted service of process of *Castaneda's* December 14, 2001, and later amended October 18, 2002 civil complaints without providing Petitioner any notice of the suit against him, and without first obtaining Petitioner's consent. A year passed before Petitioner was notified that he was a defendant. While Petitioner remained

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[1] April 11, 2003 e-mail of Deputy City Attorney Laden- **Appendix A**

uninformed about the *Castaneda* suit, City's Lead Trial Counsel James Hodgkins acted with a conflict of interest as he simultaneously represented Petitioner, and the City.

A. Procedural History in State Court Relevant to Petitioner's first case

In August 2003 after exhausting all administrative remedies, Petitioner filed suit in the Alameda County Superior Court under 42 U.S.C. §1983, and Title VII of the 1964 Civil Rights Act.

On July 24, 2003, after notifying the Equal Employment Opportunity Commission of the aforementioned facts, Petitioner received a " Right to Sue Notice" which Petitioner filed with his first complaint.

On August 18, 2003, after notifying the United States Department of Justice of the aforementioned facts, Petitioner receive a "Right to Sue Notice" which Petitioner filed with his first complaint.

In October 2003, Petitioner amended his first complaint to include members of the Oakland City Council who acted with deliberate indifference to Petitioner's request for intervention concerning City's violation of California Government Code 3304(b).

B. Procedural History in Federal Court Relevant to Petitioner's first case

On January 23, 2004, Defendant City of Oakland filed a petition for removal and Petitioner's case was removed from state to federal court.

On April 20, 2004, Petitioner entered into an agreement with the City of Oakland to settle his first complaint. The key term of the agreement drafted by the City was that Petitioner's obligation to settle was contingent on the Oakland City Council approving the settlement of the related *Castaneda* case.

On June 1, 2004, the Oakland City Council voted not to settle the *Castaneda* case. Petitioner continued to prosecute his Title VII cases.

On June 25, 2004, the City filed a motion under FRCP 12(b)(6) to dismiss Petitioner's first case. The motion was silent regarding the April 20, 2004 settlement agreement.

On July 28, 2004, the district court dismissed Petitioner's case without prejudice for Petitioner's failure to timely respond to City's 12(b)(6) motion. On August 17, 2004, Petitioner timely filed a Second Amended Complaint.

On September 10, 2004, City filed a 13 day late 12(b)(6) Motion to dismiss Petitioner's Second Amended Complaint.

Commencing August 25, 2004, through October 15, 2004, Petitioner propounded request for admissions. The City refused to comply with Petitioner's discovery request.

On September 13, 2004, Petitioner filed a request for entry of default for the City's failure to timely respond to Petitioner's Second Amended Complaint. The district court refused to enter the default.

On September 20, 2004, City filed a Motion for a protective order, and stay of discovery to avoid answering Petitioner's request for admissions.

On October 12, 2004, Petitioner filed an Opposition to City's Motion for a Protective order and Stay of discovery, and an Opposition to City's Motion to dismiss his Second Amended Complaint.

On November 1, 2004, status conferences were held for the *Castaneda* case and Petitioner's case. Without any evidentiary hearing the merits of Petitioner's federal claims, Judge Patel commented:

"if its on the merits at best, you might have something left for state court...."

On November 10, 2004, Petitioner wrote the City objecting to the revival of the defunct April 20, 2004 agreement. Petitioner filed the letter with the district court.

On December 1, 2004, Petitioner filed a Motion to Rescind the April 20, 2004 settlement agreement.

On January 10, 2005, three years after Petitioner filed his employment grievance and after the City compelled Petitioner to file a lawsuit, Defendant Oakland Police Chief Peter Dunbar changed Petitioner's personnel file to reflect that the *Castaneda* complaint was completely **Unfounded**. Despite the City's acknowledgement that the complaint against Petitioner was completely fabricated, the Oakland Police Department refused to charge *Castaneda* for making a false report of a crime (CA Penal Code 148.5), and the Oakland City Attorney's Office, and Oakland City Council elected to settle the frivolous suit for $110,000.00 of the tax payers money.

On January 11, 2005, the City filed an Opposition to Petitioner's Motion to Rescind.

On January 29, 2005, Petitioner wrote the City and requested to meet and confer to discuss the settlement of his case.

On January 31, 2005, Petitioner filed four motions for Partial Summary Judgment concerning the state law claims alleged in his first case.

On February 7, 2005, Petitioner filed another Motion for Partial Summary Judgment in his first case.

On February 7, 2005, Petitioner attended a motion hearing concerning his Motion to Rescind the April 20, 2004 settlement agreement in his first case. Prior to denying Petitioner's Motion Judge Patel stated:

" You know what? Your ***underlying complaint does not state any federal claim. I told you that the last time you were here."*** *(ref. Nov. 1, 2004)*

On February 8, 2005, after admitting the day before Petitioner had no federal causes of action, and alluding to the same on November 1, 2004, Judge Patel issued an order dismissing all Petitioner's state and federal causes of action in with prejudice. [2]

C. Procedural History in Federal Court Relevant to Petitioner's Second case, and the Castaneda Case

Petitioner pled some of the following facts in his second case:

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[2] Dist. Ct. Order in re: Petitioner's first case-**Appendix B**

Petitioner was deprived of an opportunity to be heard during critical phases of pre-trial, including but not limited to participating in ADR, and answering interrogatories.

Further, Petitioner pled that City's concealments deprived him of opportunities to raise procedural challenges to have himself removed from the *Castaneda* case, i.e. filing motions to challenge improper service of process , and city's removal action without his consent.

On January 15, 2004, Petitioner, City's Lead Trial Counsel Hodgkins, Petitioner's conflict counsel Leed, and *Castaneda's* counsel attended a settlement conference for the purpose of settling the *Castaneda* case.

After Leed failed to get Petitioner to agree to conceal facts from the federal court concerning the flawed police internal investigation and Petitioner's EEO activities, Leed told Petitoner, who was not in the same room the settlement proceedings were being held, that the case was not going to settle and that Petitioner could leave. Petitioner left.

After making a false representation to Petitioner, Leed, falsely represented to the settlement judge that Petitioner had a doctor's appointment and had to leave. Leed then joined City's Hodgkins, and *Castaneda's* counsel Roberts in violating Petitioner's federally protected rights of due process and equal protection under the law by agreeing to, and in fact obtaining a restraining order against Petitioner restraining Petitioner from *Castaneda.* The restraining order was agreed to as a term of the settlement agreement. Its request as well as its issuance was unwarranted, and conducted in violation of Federal Rule of Civil Procedure 65.

State and federal law prohibits persons with court imposed restraining orders from possessing firearms.

Petitioner's livelihood as a police officer depends on his ability to be able to lawfully possess a firearm.

As a result of the agreements and actions taken by the district court, Petitioner became unable to lawfully carry a firearm, which resulted in an extinguishment of Petitioner's 2nd Amendment rights, as well as an alteration of the terms and conditions of Petitioner's employment as a police officer. Due process was required. Petitioner received no due process thereby giving rise to Petitioner's claims that the attorneys named in his second case engaged in violations of Petitioner's 14th Amendment rights, and Title 18 §241 U.S.C.

On March 31, 2004, a subsequent proceeding was held for the purpose of settling the *Castaneda* case.

On April 20, 2004, Petitioner entered into an agreement with the City to settle his first case. The agreement was exclusive to Petitioner and the City officials. It carried the same contingency clause as the March 31, 2004 agreement in the *Castaneda* case which was that settlement would be contingent on the Oakland City Council approving the proposed settlement of the *Castaneda* case.

On May 5, 2004, after Petitioner notified the California Department of Fair Employment and Housing of racially disparate treatment he received by members of the Oakland City Attorney's Office, Petitioner received a " Right to Sue Notice."

On June 1, 2004, the Oakland City Council was presented with the *Castaneda* settlement proposal and voted not to accept it.

On November 1, 2004, status conferences were held for the *Castaneda* case and Petitioner's case. Issues regarding the

settlement of both cases were discussed at both conferences, and the City announced its desire to revive the defunct settlement agreements of March 31, 2004, and April 2004. Petitioner objected. Judge Patel who agreed with the City and *Castaneda's* counsel stated the following to Petitioner regarding the federal claims in Petitioner's first case:

"if its on the merits at best, you might have something left for state court...."

On November 10, 2004 Petitioner made the court aware of conflicts of interest that existed between the City and Leed. Judge Patel approved city appointed Attorney Geoffrey Beatty as Petitioner's conflict counsel.

On January 17, 2005, Petitioner wrote Settlement Judge Magistrate Bernard Zimmerman expressing opposition to any attempt by the court to impose the defunct April 20, 2004 settlement agreement in Petitioner's first case.

On January 18, 2005, Petitioner filed his second civil rights complaint. Petitioner joined state claims against *Castaneda's* counsel for abuse of the civil process, and defamation after he admitted in un-refuted evidentiary e-mails that restraining orders he sought, and received against Petitioner were unwarranted. [3]

On March 16, 2005, *Castaneda's* counsel filed a motion to enforce the March 31, 2004 settlement agreement.

On March 24, 2005, Attorney Beatty, who was provided other conflict case work by the city of Oakland,

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[3] arguments from Pet.'s May 25, 2006 motion for sanctions against Dennis Roberts and Paul Turley in the *Castaneda case*-**Appendix C**

moved to withdraw as Petitioner's defense counsel in the *Castaneda case* due to an unwaivable conflict of interest.

On April 12, 2005, Judge Patel accepted Beatty's Motion of withdrawal, and despite the City's legal duty to provide Petitioner with conflict counsel, Petitioner became a *Pro Se Defendant* in the *Castaneda case.*

On May 25, 2005, Petitioner filed a Motion for Sanctions against *Castaneda's* counsel for their numerous acts of misconduct, and an Opposition to their motion to enforce the March 31, 2004 settlement. The motion raised issues about Judge Patel's failure to remain impartial and to recuse herself.

On May 31, 2005, Petitioner filed a Motion for Cause hearings to challenge the restraining orders that were placed on him on June 30, 2003, and January 15, 2004.

On July 11, 2005, Petitioner filed a Motion for Partial Summary Judgment against *Castaneda.* Judge Patel refused to rule on the motion.

On July 19, 2005, Petitioner filed a Motion for Injunctive Relief moving the district court to grant him conflict counsel.

On July 20, 2005, all of Petitioner's pending motions were assigned to Judge William A. Alsup.

On July 21, 2005, Petitioner wrote the district court clerk notifying him that he was consistently not receiving correspondence from the court that the other parties to the litigation were receiving. Petitioner filed the letter with the district court.

On August 8, 2005, the City of Oakland filed an Opposition to Petitioner's July 11, 2005 Motion for Partial Summary Judgment against *Castaneda.* The City' motion was joined by *Castaneda's* counsel.

On August 11, 2005, Petitioner filed a letter he sent to the City Attorney's Office regarding their continued failure to provide him defense counsel in the *Castaneda* case.

On August 15, 2005, Petitioner filed a Motion to challenge the district court's exercise of personal jurisdiction over him since he'd never been served in the *Castaneda* case.

On August 25, 2005, Petitioner filed numerous letters sent to the City Attorneys Office regarding their failure to provide him defense counsel.

On August 29, 2005, at a proceeding for the settlement of the *Castaneda* case, despite the previous assignment of Petitioner's pending motions to Judge Alsup, Judge Patel presided, and refused to address Petitioner's pending motions. Further, without benefit of counsel, Petitioner was ordered to sign a draft of the March 31, 2004 settlement agreement under threat of contempt. Petitioner maintained that the draft did not reflect the terms discussed, that he didn't approve the draft as required by the March 31, 2004 agreement, and that he never had any opportunity to review the draft with counsel.

On September 20, 2005, Judge Patel issued an order dismissing the *Castaneda* case, and Petitioner's second complaint. The order stated that Petitioner's second complaint was barred by res judicata because of the district court's enforcement of the settlement agreement to Petitioner's first case on February 8, 2005.[4]

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[4] Dist. Ct. September 20, 2005 orders- **Appendix D; Appendix-E**

On September 26, 2005, Petitioner timely filed a Notice of Appeal to the Ninth Circuit Court of Appeals.

On August 28, 2006, the Court of Appeals affirmed the district court's decision and entered judgment against Petitioner.[5]

On September 9, 2006, Petitioner timely filed a Petition for an en banc hearing with the Ninth Circuit.[6]

On October 13, 2006, the Court of Appeals filed a decision not to hear Petitioner's appeal en banc.[7]

D. Procedural history of Petitioner's Judicial Misconduct Complaint to the Ninth Circuit Court of Appeals

On March 17, 2006, Petitioner filed a Judicial Misconduct complaint against Judge Patel for among other things, failing to abide by 28 U.S.C.§1447 (c); failing to hear Petitioner's motion for appointment of conflict counsel in the *Castaneda* case; and failing to abide by 28 U.S.C. §455. The Misconduct Committee declined to address Judge Patel's failures.

E. Procedural history of Petitioner's complaints to the California State Bar Association regarding the attorneys involved in the litigation of Petitioner's cases and the *Castaneda* case

On October 8, 2003, Petitioner filed a complaint against attorneys for the City of Oakland to the California State Bar Association. In the complaint, Petitioner notified the Bar that on December 14, 2001, and October 18, 2002, members of the

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[5] Court of Appeals August 28, 2006 Judgment **Appendix F**

[6] Pet.'s Sept. 9, 2006 Petition for rehearing en banc- **Appendix G**

[7] Court of Appeals October 23, 2006 Rehearing denial- **Appendix H**

Oakland City Attorney's Office accepted service of *Castaneda's* civil complaints for him without Petitioner's notice or consent, and without informing him until June 24, 2003 he was being sued

On January 30, 2006, the State Bar sent Petitioner a letter stating they were not going to address any of the numerous violations of professional ethics committed by the attorneys for the city or *Castaneda's* attorneys.

On March 27, 2006, Petitioner filed a verified complaint to the California Supreme Court concerning the State Bar's refusal to address his complaint.

On May 10, 2006, an en banc panel of the California Supreme Court denied Petitioner's request for a hearing regarding his attorney misconduct complaint.

F. Procedural history of Petitioner's complaints to the California Attorney General's Office

On January 25, 2006, Petitioner wrote the California Attorney General's Office and requested intervention concerning the City's violations of due process provisions of the California Peace Officer's Bill of Rights, and the City Attorney's routine practice of representing officers with know conflicts of interest. The California Attorney General's Office declined to intervene.

G. Procedural history of Petitioner's complaints to the Alameda County District Attorney's Office

On January 25, 2006, Petitioner wrote Alameda County District Attorney Thomas Orloff and requested his office investigate the conspiracy to violate his civil rights in violation

of Title 18 §241 U.S.C. engaged in by the attorneys involved in the litigation of Petitioner's case, and the *Castaneda* case.

On February 24, 2006, Alameda County District Attorney Thomas Orloff wrote Petitioner informing him that he forwarded Petitioner's complaint to an Alameda County Grand Jury. Petitioner notified his Congressional Representatives and State Senators.

On February 17, 2006, Senator Dianne Feinstein responded to Petitioner. On March 21, 2006 Senator Boxer responded to Petitioner forwarding Petitioner's request for intervention to Mayor Jerry Brown, who Petitioner had notified years prior. Mayor Brown failed to respond.

II. LEGAL ARGUMENT

A. The Ninth Circuit Court of Appeals completely failed to address whether or not the district court had subject matter jurisdiction

In it's August 21, 2006 order, a three member panel of the Ninth Circuit Court of Appeals cite they examined, and agreed with the district court's interpretation of the settlement agreements. Petitioner submitted a Petition for a rehearing detailing with specificity why the district court had no subject matter jurisdiction over his first case prior to enforcing its settlement. The Ninth Circuit Court of Appeals responded by completely disregarding Petitioner's arguments concerning 28 U.S.C. §1447 and 28 U.S.C. §455, upheld the district court's decision, and refused to grant Petitioner a rehearing.

B. Presiding District Court Judge Patel made comments That indicated she failed to abide by her non-discretionary duty to remand under 28 U.S.C §1447 (c)

28 U.S.C. §1447 (c), is commonly known as the "remand statute." In pertinent part, the statue reads:

"if at any time before final judgment it appears that a district court lacks subject matter jurisdiction the case shall be remanded."

On November 1, 2004, at a status conference held for the *Castaneda* case Judge Patel made the following comment concerning Petitioner's first case:

"if its on the merits at best, you might have something left for state court...."

Judge Patel's November 1, 2004 comment clearly demonstrates that she believed that Petitioner had no viable federal cause of action.

On February 7, 2005, Petitioner attended a proceeding which in part concerned Petitioner's December 1, 2004 Motion to Rescind the April 20, 2004 settlement agreement in his first case. Prior to denying Petitioner's motion Judge Patel told Petitioner:

"You know what? ***Your underlying complaint does not state any federal claims****. I told you that the last time you were here." (ref. Nov. 1, 2004)*

At the February 7, 2005 proceeding, commenting on Petitioner's five filed motions for Summary Judgment in his first case, in pertinent part Judge Patel stated: :

" That motion is going nowhere, I can tell you that. Because you don't have- ***The claims that you filed in this court are not federal claims....****"*

Judge Patel's comments clearly demonstrate that by February 7, 2005, she was sure that Petitioner had not stated any federal cause of action.

C. Judge Patel retained Petitioner's first case and dismissed it without having subject matter jurisdiction

Pursuant to 28 U.S.C. §1447(c), Judge Patel's authority over Petitioner's first case ceased to exist once she stated that Petitioner had raised no federal cause. Judge Patel had a non-discretionary, self-executing duty to remand Petitioner's case to state court. The un-refuted facts demonstrate Judge Patel failed to abide by the statute, and therefore acted without jurisdiction.

D. Precedent set by the Supreme Court holds that 28 U.S.C. § 1447 (c) imposes a non-discretionary, self executing duty on every federal judge to remand when they *believe* no federal cause exist

Because removal jurisdiction raises significant federalism concerns, the Court has consistently directed lower courts to strictly construe 28 U.S.C. §1447 (c) *Shamrock Oil & Gas Corp.; v. Sheets,* 313U.S. 100, 108-109 (1941). In its decision in *International Primate Protection League,* the Court specifically addressed provision (c) of 28 U.S.C. §1447, and in doing so reached the same conclusion as it had decades earlier, which is that 28 U.S.C. § 1447 is a non-discretionary self-executing duty that all federal judges must follow. *International Primate Protection League v. Administrators of Tulane Educational Fund,* 500 U.S. 72, 87-89 (1991).

The facts clearly demonstrate that Judge Patel failed to abide by 28 U.S.C. §1447, and in the review of Petitioner's appeals and request for rehearing en banc, the Ninth Circuit Court of Appeal failed to consider the fact that Judge Patel's

duty to remand was not an option, it was mandated imposed by statutory law, and precedent of the United States Supreme Court, and the Ninth Circuit Court of Appeal.

E. The Ninth Circuit Court of Appeals failed to adhere to precedent set by the Supreme Court when they failed to address the district court's failure to strictly construe 28 U.S.C §1447 (c)

The Court has consistently directed lower courts to strictly construe 28 U.S.C. §1447. *Shamrock Oil & Gas Corp.; v. Sheets,* 313U.S. 100, 108-109 (1941).District Court Judge Patel didn't consider 28 U.S.C. §1447 (c). Petitioner's Petition for Rehearing to the Ninth Circuit unquestionably reveals this fact, an the Ninth Circuit Court of Appeals completely evaded the issue. The problem is that the Court has consistently held that limits on federal jurisdiction must neither be disregarded or evaded. *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 374, 98 S. Ct. 2396 (1978).

F. By failing to address Petitioner's argument concerning the district court's failure to abide by 28 U.S.C. § 1447, the Ninth Circuit Court of Appeals disregarded its own precedent

In *Wilshire,* the Ninth Circuit held that statues must be interpreted in a manner that gives meaning to all of their provisions in the plain ordinary English which they are written in . *Wilshire Westwood Assoc. v. Atlantic Richfield,* 881 F. 2d 801 (9th Cir. 1989). Provision (c) is the pertinent provision of 28 U.S.C. §1447 which mandates that district court judges remand cases where they *believe* they have no subject matter jurisdiction to preside over. The Ninth Circuit Court of Appeals failed to recognize the law and failed to abide by its own precedent set in *Wilshire* regarding the strict interpretation of statutes to give due deference to Congressional intent. The

Circuit Court also ignored rulings in other cases where the Court, and they themselves, held that a district court judge's duty under 28 US.C. §1447 (c) is non-discretionary. *St. Paul Mercury Indemnification Co. v. Red Cab Co.,* 303 U.S. 283, 293, 58 S. Ct. 586, 592 (1938); *Bruns v. National Credit Union Administration,* 122 F. 3d 1251, 1257 (9th Cir. 1997); *Toumajian v. Frailey,* 135 F. 3d 648, 655 (9th Cir. 1998).

G. The Supreme Court and Ninth Circuit have consistently held that before a court can act it must first have jurisdiction to act

In *Ex prate McCardle,* the Court held and has consistently held *" without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." Ex Parte McCardle,* 74 U.S. (7 Wall) 506 19 L. Ed. 264 (1868), *American Fire and Casualty Company v. Finn,* 341 U.S. 6, 17-18 (1951); *Augustine v. United States,* 704 F. 2d 1074, 1077; *International Primate Protections League v. Administrators of Tulane Educational Fund,* 500 U.S. 72,87-89 (1991)

In *Hajek,* the Ninth Circuit Court of Appeal held that district courts are duty bound to initially determine subject matter jurisdiction. *Hajek v. Burlington Northern R.R. Co.,* 18 F. 3d 1105, 1107 (9th Cir. 1999).

H. The Supreme Court has consistently held that when a judge acts without jurisdiction the judge is in violation of the due process clause of the Constitution

On February 8, 2005, Judge Patel inappropriately dismissed Petitioner's case in its entirety, completely leaving Petitioner with no forum from which to seek relief.

All judicial officers are obligated to abide by the United States Constitution and the federal rules. Rule 28 U.S.C. §1447 (c) mandated that Judge Patel remand Petitioner's first case. Judge Patel impermissibly retained jurisdiction over Petitioner's first case in violation of 28 U.S.C. §1447 (c).

In *U.S. v. Will*, the Court held, *"Whenever a judge acts where he/she does not have jurisdiction to act, the judge is engaged in an act or acts of treason. U.S. v. Will,* 449 U.S. 200, 216, 101 S. Ct. 471, 66 Led. 2d 392, 406 (1980).

In *Cooper v. Aaron,* the Court held, *" No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." Cooper v. Aaron,* 358 U.S. 1, 78 S. Ct. 1401 (1958).

Pursuant to this Court's rulings in *U.S. v. Will*, and *Cooper v. Aaron*, Judge Patel not only violated Petitioner's due process rights she engaged in act of war against the very Constitution she is duty bound to support, and obey.

I. The Ninth Circuit Court of Appeals must abide by the doctrine of Stare Decisis

Because Congress is free to change their interpretation of federal statutes, the Supreme Court has made it clear that once it renders a decision concerning the meaning of a federal statute, it gives great weight to the doctrine of stare decisis. *Id. At* 295 (quoting *Brick Co. v. Illinois,* 431 U.S. 720, 736 (1977). The Court has also held that once it has been determined a statute's meaning under the doctrine of Stare Decisis, it adheres to its rulings concerning the statute. *Neal v. United States,* 516 U.S. 284, 295 (1996).

The facts relayed in Petitioner's Petition for Rehearing en banc, and the facts herein clearly demonstrate that on

November 1, 2004, and February 7, 2005, Northern District Court Judge Marilyn H. Patel was clearly of the opinion that Petitioner had raised no federal cause of action in his first case ***prior*** to her dismissal of the case in its entirety.

The Supreme Court and the Ninth Circuit Court of Appeals have consistently held that Congress meant for 28 U.S.C. §1447 (c) to be strictly applied. The facts clearly demonstrate that neither 28 U.S.C. §1447 (c) or 28 U.S.C. §455 were strictly complied with as Congress intended, and as the Court has consistently held they must be complied with. By denying Petitioner's request for a rehearing, and failing to address these issues, the Ninth Circuit Court of Appeals failed to abide by the doctrine of stare decises.

J. A Jurisdictional challenge may be raised at anytime during the course of litigation or the appeals process

A progeny of Supreme Court cases support the premise that a presiding district court judge has a continual obligation to make sure that she has jurisdiction before acting, and that if that jurisdiction ceases to exist, that remand is mandated. *Ex Parte McCardle,* 74 U.S. (7 Wall) 506 19 Led. 254 (1868); *St. Paul Mercury Indemnification Co. v. Red Cab Co.,* 303 U.S. 283, 293, 58 S. Ct. 586, 592 (1938); ; *American Fire and Casualty Company v. Finn,* 341 U.S. 6, 17-18 (1951); *U.S. v. Will*, 449 U.S. 200, 216, 101 S. Ct. 471, 66 L. Ed. 2d 392, 406 (1980); *Augustine v. United States,* 704 F. 2d 1074, 1077; *International Primate Protections League v. Administrators of Tulane Educational Fund,* 500 U.S. 72,87-89 (1991)

The Supreme Court and the Circuit Court has held that a judge's duty under FRCP 12(h)(3) and 28 U.S.C. §1447 (c) is non-discretionary and self executing. Further, similar to the Court, the Circuit Court has held that the defense of lack of

subject matter jurisdiction cannot be waived. *Billinsgley v.C.I.R.*, 868 F. 2d 1081, 1083 (9th Cir. 1989)

The fact that Petitioner raised jurisdictional issues after Judge Patel made a decision to force Petitioner to settle the claims in his first case is inconsequential because a court's lack of jurisdiction may be raised at anytime. *Vun Cannon v. Breed,*565 F. 2d 1096. 1097 (9th Cir. 1977); *Shabazz v. Carrol,*833 F. 2d 149 (9th Cir. 1987);; *Bruns v. National Credit Union Administration,* 122 F. 3d 1251, 1257 (9th Cir. 1997); *Toumajian v. Frailey,*135 F. 3d 648, 655 (9th Cir. 1998).

K. The Ninth Circuit Court has ignored the fact that Judge Patel failed to recuse herself from the *Castaneda* case and Petitioner's cases as mandated by 28 U.S.C. §455

On August 9, 2004, at a proceeding concerning Petitioner's first case, and the *Castaneda* case, on the record, Judge Patel spontaneously stated the following:

" Maybe what I'll do is just recuse myself for a whole lot of reasons anyway, from this case, ..."

In addition to Judge Patel's comment which clearly speaks for itself, Petitioner notified the Circuit court of biased comments and actions engaged in by Judge Patel throughout the district court litigation of the *Castaneda* case and both of Petitioner's cases. One such notice included notifying the Circuit Court that *Castaneda's* counsel apprised the district court judge of details of the settlement in dispute, and convinced her to allow the City to present the *Castaneda* proposal again. In *Camero,* the Court stated that " it is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately

communicate to the decision makers." *Camero v. United States,* 375 F. 2d 777 (U.S. Claims 1967), at 781.

Judge Patel's comments and actions created the appearance of bias. Pursuant to 28 U.S.C. 455, and case precedent, Judge Patel had a non-discretionary self executing duty to recuse herself. *Liteky v. U.S.*, 510 U.S. 540 (1994), 114 S. Ct. 1147, 127 L. Ed. 2d 474.

Due process requires that a judge be sufficiently neutral and free of disposition to be able to render a fair decision. The Court has held that " No person should be require to stand trial before a judge with a bent of mind" *Berger v. United States,* 255 U.S. 22, 33, 41 S. Ct. 230, 233, 65 L. Ed. 481 (1921).

The relevant consideration under 28 U.S.C. §455 (a) was not whether or not Judge Patel was actually biased but whether or not there was the appearance of bias in the proceedings. *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847 (1988); *Public Utilities Comm'n of D.C. v. Pollack,* 343 U.S. 451, 466-67, 72 S. Ct. 813, 822-23, 96 L. Ed. 1068 (1952). Petitioner believes that any objective observer apprised of the facts Petitioner relayed would believe that the presiding judge was biased.

Despite Petitioner's revelations to the Ninth Circuit Court of Appeals that Judge Patel utterly failed to perform her non-discretionary, self executing duty to recuse herself, as required by 28 U.S.C. §455, similar to their failure to address Judge Patel's failure to remand under 28 U.S.C. §1447 (c) , the Circuit Court completely failed to address the issue.

L. The Defendants in Petitioner's second case have taken unfair advantage of Petitioner because of Judge Patel's failure to abide with 28 U.S.C. 1447, and 28 U.S.C. 455 in Petitioner's first case

Dissimilar to his first case, Petitioner's state claims in his second case were not dismissed by the district court's September 20, 2005 order. Since Petitioner's state law claims were not dismissed by the district court in his second case, on January 16, 2005, Petitioner timely submitted these claims in the state court.

The City responded by requesting that the state court take judicial notice of the February 8, 2005 district court order rendered in Petitioner's first case. In addition, the City convinced the state court to grant the February 8, 2005 district court order res judcata effect to estopp Petitioner from bringing the state claims in his second case.

Without going into detail about the validity of the district court judgment, detail Petitioner believed the law required, the state court simply complied with the City's request to take judicial notice, and granted it res judicata effect.

The City then advanced a frivolous breach of contract claim against Petitioner, and filed a Motion for Summary Judgment against Petitioner for breach of the enforced settlement agreement in Petitioner's first district court case. The state court granted res judicata. The problem is that prior to giving the district court's February 8, 2005 order resjudicata effect the state court failed to consider whether or not the district court's order should have been issued in the first place. Petitioner filed a Motion for Reconsideration requesting that the state court adhere to its obligations under *Kremmer* and first determine if the underlying litigation in the district court were full and fair prior to giving the district court's February 8, 2005 res judicata effect. *Kremmer v. Chemical Construction Corp.*, 456 U.S. 461, 484-484 (1982) (held that before a judicial decision may be given res judicata effect that the subsequent court giving effect to the decision must first be

sure that the underlying litigation concerning the decision was full and fair.

Petitoner maintains that the state, district, and circuit courts that have given res judicata effect to the district court's February 8, 2005 ruling have failed to follow the Supreme Court's standard in *Kremmer.*

The facts demonstrate that the proceedings at the district court were extremely unfair for Petitioner as officers of the court like Dennis Roberts and Claudia Leed engaged in a personal acrimonious battle against each other violating the rules of the court, and Petitioner's rights as a litigant and as a citizen in the process. Petitioner revealed some of the violations in his motions for sanctions in the district court, which revealed writings by Dennis Roberts demonstrating just some of his misconduct. The misconduct by counsel on both sides included but was not limited to making misrepresentations to each other and the court. The misconduct was committed unchecked by the presiding judge, was detrimental to Petitioner, but more important was detrimental to the integrity of the judicial process.

Notwithstanding all of the aforementioned improprieties, Petitioner maintains that it is unlikely that any reasonable objective observer apprised with the facts would believe that an adverse decision rendered upon a party who was denied legal counsel in a proceeding where the district court judge 1) admitted to having no subject matter jurisdiction, and 2) that she should recuse herself, could survive this Court's standard under *Kremmer* as being a proceeding that was considered full and fair.

III. CLOSING

Petitioner is a Pro Se advocate, not a licensed attorney. Just as it was not unreasonable for Petitioner to expect City's management, and City's attorneys to know and properly apply the law concerning his due process rights, it was not unreasonable for Petitioner to expect the presiding district court judge to know and properly apply the law. Facts in the record clearly detail that the law was not adhered to and that the district court judge exceeded the limits of her authority. For example:

- The district court exercised personal jurisdiction over Petitioner in the *Castaneda* case even though the court was aware that Petitioner had never been properly served; and refused to hear Petitioner's motion to challenge the improper service;

- Prior to dismissing Petitioner's first case, Judge Patel admitted that the court had no subject matter jurisdiction, refused to comply with 28 U.S.C. 1447, dismissed Petitioner's first case in its entirety, then gave res judicata effect to her order dismissing Petitioner's first case in order to dismiss Petitioner's second case;

- Prior to dismissing Petitioner's first case, Judge Patel admitted that she should recuse herself, then refused to comply with 28 U.S.C 455;

- Judge Patel allowed restraining orders to be requested, and placed a restraining order on Petitioner in violation of every protective provision of FRCP 65, then refused to hear Petitioner's motion for a cause hearing to challenge the imposition of the orders;

- In violation of local rules mandating that settlement negotiations be kept confidential, Judge Patel allowed the attorneys practicing before her to openly discuss the terms, and even dollar amounts of the settlement in dispute;

The aforementioned are just a few examples of how Judge Patel simply disregarded federal law and the rules. In other Ninth Circuit cases where a presiding judge failed to abide by statutory law, and issued a ruling inconsistent with statutory law, Supreme Court precedent, or precedent set by the Ninth Circuit, the Circuit Court granted a rehearing. *Carter v. Derwinski,* 987 f. 2d 611, 613-615 (9th Cir. 1993). Petitioner's case demonstrates the type of failures that the Ninth Circuit has addressed by granting an en banc hearing. The Ninth Circuit Court of Appeals should have granted Petitioner a rehearing.

Petitioner believes that if Judge Patel had adhered to her mandated duties under 28 U.S.C. 455, she would have recused herself from Petitioner's first case, and it may have been assigned to another judge who may have 1) scrutinized Petitioner's federal claims instead of arbitrarily dismissing them as Judge Patel did, and 2) who may have adhered to 28 U.S.C 1447 (c), and remanded. All the facts suggest that because Judge Patel failed to take actions mandated by law that Petitioner has been unconstitutionally deprived of a forum to seek relief.

A. A decision from the Supreme Court is imperative to maintain the continuity of opinion among the circuit courts concerning limits of federalism

Notwithstanding the irreparable harm that the district court's failure to abide by 28 U.S.C. 1447, and 28 U.S.C.

455 has caused Petitioner, the district court's failures have resulted in a drastic deterrence from the precedent set by this Court and other circuit courts regarding a judge's non-discretionary duties under 28 U.S.C. 1447, and 28 U.S.C. 455.

Judge Patel's acts of , and the Ninth Circuit's failures to address Her acts of issuing a final judgment after admitting the district court had no subject matter jurisdiction, and continuing to preside over a case where she admitted she should recuse herself have disturbed the continuity of opinion and precedent of the Supreme Court and the circuit court's which have all held that 28 U.S.C. 1447, and 28 U.S.C. 455 does not allow a judge to lawfully engage in the actions that Judge Patel engaged in.

Only this Court can reverse the district court's unconstitutional actions and maintain the precedent, and the continuity that previously existed between the Supreme Court, and the circuit courts. If this Court fails to address these issues, it will cause a riff between the circuits concerning the limits of federalism, and a judges non-discretionary duties under 28 U.S.C. §1447 and 28 U.S.C. §455. Further it will likely result in encouraging the Oakland City Attorney's Office to continue what has become its standard practice of removing civil cases from state to federal court then disingenuously arguing as they did in the federal forum that Plaintiff's have stated no federal cause of action.

B. The Oakland City Attorney's Office has repeatedly dealt with Petitioner in bad faith

The Oakland City Attorney's Office has demonstrated bad faith toward Petitioner and committed a disservice to Petitioner, Oakland Police Officers, and the taxpayers of the City of Oakland by compelling Petitioner to file his first suit.

Nothing is more demonstrative of the City Attorney's Office abject bad faith towards Petitioner and waste of tax payer money than the position the City took concerning Petitioner's and other officer's due process rights.[8] This is particularly true since the City was forewarned of the illegality concerning their position. [9]Petitioner should not be punished by having his adversaries cost and attorneys fees imposed on him for simply revealing the fact that a federal judge failed to comply with the law.[10] Petitioner respectfully request that this Court consider these facts in the event his adversaries move to obtain cost and attorney's fees in relation to this appeal.

RELIEF REQUESTED

Petitioner respectfully request that this Court remand Petitioner's first and second case to district court with orders mandating the district court abide by 28 U.S.C. 1447, and 28 U.S.C. 455, or in the alternative, grant certiorari, and independently rule on the facts relayed herein, or mandate that the Ninth Circuit Court of Appeals convene an en banc panel to hear Petitioner's Petition for Rehearing. Further, for reasons cited herein, Petitioner prays that this Court adhere to the Ninth Circuit Court of Appeals order and order that any adverse Party bear his own cost and attorney's fees.

Respectfully submitted,

Frank Morrow Jr.

Frank Morrow Jr., Petitioner Pro Se

Date: FEB 27 2007

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[8] Deputy City Attorney Laden's April 11, 2003 e-mail –**Appendix-A**

[9] February 14, 2003 Letter from Attorney Rocne Lucia to Deputy City Attorney Laden- **Appendix I**

[10] City has requested attorney's fees and sanctions against Petitioner in state court because of Petitioner's appeals

APPENDIX

Paredes Elida

From: Vicki Laden

Friday, April 11, 2003 3:02 PM

To: Russo, John; Paredes, Elida

Subject: Frank Morrow claim

I just reviewed this file, which Elida gave me a couple of weeks ago. What Morrow is correctly alleging (leaving aside all of his dead-in-the water theories) is that the City violated his statutory rights by not providing him with a hearing on the arguably negative comments added to the "not sustained" finding in his personnel file.

Although Morrow is pond scum, he is correct in his allegation that he should have been provided an administrative hearing outside of the grievance process, because case law now holds that such comments constitute "punitive action," for which an officer must be afforded an administrative appeal (albeit one with limited due process protections). I assume Morrow filed the claim with the city to satisfy the presentment requirement prior to filing an action for violation of Government Code Section 3303. Because the OPOA is currently not pushing this issue, I doubt PORAC will represent him so he may not file suit.

Appendix- A

FILED
FEB- 8 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK MORROW JR.

Plaintiff,

v.

CITY OF OAKLAND, et al.,

Defendants.
_____/

No. C 04-0315 MHP

MEMORANDUM & ORDER

On April 20, 2004, plaintiff Frank Morrow executed a settlement agreement with the City of Oakland to resolve his complaint against the city for alleging, under 42 U.S.C. §§1983 & 1985, that defendant's handling of an internal investigation violated his rights under the United States Constitution and various state statutes. Now before the court is plaintiff's motion to rescind the settlement agreement. After considering the parties' arguments and submissions, and for the reasons set forth below, the court rules as follows.

BACKGROUND

On May 16, 2001, plaintiff Morrow was accused by a member of the public, Griselvia Castaneda, of attempted sexual assault during the course of her arrest. Plaintiff vigorously denied the allegation, and an internal investigation of the charges yielded a finding that Castaneda's charges were "not

sustained." Over the course of the investigation, plaintiff remained employed at all times by the Oakland Police Department ("OPD"), where he continues as an officer to this day. However, pending the completion of the investigation by the OPD's Internal Affairs division, plaintiff was placed on paid Emergency Administrative Leave for 43 days. Plaintiff was informed of this sudden leave by the revocation of his badge, gun, and police I.D. in the presence of other officers. During this leave, plaintiff feared the permanent loss of his position and acquired training in another vocation as an emergency measure.

The OPD entered the finding of "not sustained" for Castaneda's complaint on July 19, 2002. Plaintiff sought administrative review to challenge the retention of the Castaneda allegation in his personnel file as well as the "not sustained" finding, which plaintiff argues has served as a basis for a disciplinary history and employment sanctions in the past. The police department maintained that the finding of "not sustained" was a "non-grievable action," and informed plaintiff that in the Department's view, such a disposition "absolves an employee of wrongdoing."

On February 11, 2004, plaintiff, proceeding pro se, brought this action against defendants the City of Oakland, Jerry Brown, a number of Oakland city employees, and several senior officers of the Oakland Police Department. In a 69-page complaint, plaintiff alleged, under 42 U.S.C. §§ 1983 & 1985, that defendant's handling of an internal investigation violated his First Amendment right to free speech, Fourth Amendment right to be free from unreasonable searches and seizures, and Fourteenth Amendment right to equal protection. In addition, he brought nine pendent state law causes of action. He brought he action for two apparent purposes: to contest the conduct and

disposition of his department's investigation into Castaneda's allegation and, more generally, to challenge he management and investigative practices within the force.

On April 20, 2004, prior to this court's disposition of defendants' motion to dismiss plaintiff's Second Amended Complaint, Morrow and the City of Oakland executed a settlement agreement to resolve his pending case. The agreement obligated the parties to the following actions at the following times: (1) on or before April 21, 2004, Morrow was to execute a release of his claims against defendant, which would be held by Magistrate Judge Bernard

Zimmerman until the occurrence of specified events in the agreement, (2) the city's attorney was to recommend to the Chief of Police of the Oakland Police Department that the evidence might warrant a review of he disposition of the Castaneda complaint, (3) if the Oakland City Council was to approve the settlement executed in the Castaneda matter, then the Chief of Police was to review the investigation finding to determine whether "not sustained" should be changed to "unfounded," (4) if the Oakland City Council approved the Castaneda settlement and the disposition of the complaint was changed to " unfounded," the magistrate judge was to deliver executed, original copies of the release agreement and the Finding Change to the City and Morrow, respectively, (5) City was to pay Morrow the sum of $5,000 within fourteen days of receiving the executed release agreement from the magistrate judge, and (6) if the Oakland City Council approved the Castaneda settlement but the Chief of Police did not change the investigative finding, then Morrow's release was to be of no force and effect. Agreement ¶¶
1-7.

Plaintiff filed a motion to rescind the settlement agreement on December 21, 2004. The Oakland City Council finalized approval of the settlement of the Castaneda lawsuit on

the same day. On January 10, 2005, the disposition of the Internal Investigation of the Castaneda complaint was changed from "not sustained" to "unfounded."

LEGAL STANDARD

I Settlement Rescission

Enforcement of settlement agreements in this court are governed by California contract law. See United Comm'l Ins. Srvc. V. Paymaster Corp., 962 F.2d 853, 856 (9th cir. 1992). A contract is to be interpreted so as to give effect to the intent of the parties at the time of contract formation. See Cal. Civ. Code §1636; Penn-America Ins. Co. v. Mike's Tailoring, 22 Cal. Rptr. 3d 918, 922 (Cal. Ct. App. 2005). The parties' intent is to be inferred from the written provisions of he contract. Cal. Civ. Code § 1639. Written provisions of a contract should be interpreted in their ordinary sense, unless used by the parties in a technical sense, or unless given special meaning by usage in contract. Cal. Civ. Code §1644. A party may rescind a contract or settlement agreement in the case of a defense to contract formation (such as economic duress, fraud, mistake, or unconscionability), where a material breach justifies the aggrieved party's termination of the contract, or where the public's interest will be prejudiced by allowing the contract to stand. See Cal. Civ. Code
§ 1689.

DISCUSSION

I. The validity of the Parties' Contract

Plaintiff argues that his settlement contract was invalid due to the absence of consideration, the city's application of economic duress, and the interest of public policy. These arguments are without legal merit.

First of all, the settlement agreement was supported by obvious consideration on both sides. See Angeles Electric Co. v. Superior Court, 32 Cal. Rptr. 2d 660, 665-666 (Cal. App. 2d Dist. 1994) (restating the well-settled proposition that consideration consist of any benefit to the promisee or detriment to the promisor). On one side, plaintiff signed a release of his claims against the City if the finding of his internal investigation was changed, and on the other side, the City agreed to pay plaintiff $5,000 and encourage the Chief of Police to review the disposition of the internal investigation. Both of these concessions constituted legal detriment to the contracting parties, and the contract requirement of mutuality of obligation was therefore satisfied. See Sully-Miller Contracting Co. v. Geldson-Cashman, 126 Cal. Rptr. 2d 400, 404 (Cal. Ct. App. 2002). The mutuality was in no way substantively unconscionable, a high standard requiring terms that are so one-sided they "shock the conscience." Nyulassy v. Lockheed Martin Corp., 16 Cal. Rptr. 3d 296, 306 (Cal. Ct. App. 2004).

Plaintiff's argument regarding economic duress is similarly unavailing. Economic duress may invalidate a contract where " one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract." Cross Talk Productions, Inc. v. Jacobson, 76 Cal. Rptr. 2d 615, 644 (Cal. Ct. App. 1998); Tarpy v. County of San Diego, 1 Cal. Rptr. 3d 607, 614 (Cal. Ct. App. 2003). Generally, the question of duress is a factual question which depends on the circumstances of the parties' bargain. Cross Talk, 76 Cal. Rptr. 2d at 664. However, in the present case plaintiff has argued no facts that imply any form of coercion by the City of Oakland. The desirability of $5,000 given plaintiff's financial situation at the time is insufficient, as a matter of law, to make a person "faced with no reasonable alternative[s]." See id. No signs of the economic compulsion,

threatened use of civil process, or other threats are applicable to the case at hand, where plaintiff simply argues that he " wished to relieve himself of the burden and pain," as well as financial emotional stress, that the conduct of the internal investigation had placed on him. See Pl's Mot. at 9.

Lastly, plaintiff argues that his contract should be deemed invalid as against public policy, because it would require him to release malpractice claims against two attorneys involved in the case. This court is aware of no case law, nor has plaintiff identified any, that identified the release of legal malpractice claims as a concern of California statutes or judicial decisions which might invalidate contracts to the contrary, thus outweighing the strong public policy interest allowing parties to freely contract. See Daun v. USAA CA. Ins. Co., 23 Cal. Rptr. 44, 48 (Cal. Ct. App. 2005).

Plaintiff has thus given this court no reason to void his settlement agreement.

II. The Contract's Terms

Given the validity of the parties' contract, the question remains as to the contract's terms. Plaintiff argues that parole evidence of the parties' bargaining histories should be interpreted to supplement the terms of the agreement. Such evidence is only admissible if a contract's terms are not plain on their face, and are susceptible to the aggrieved party's proffered meaning. See In Re Bennett, 298 F. 3d 1059, 1064 (9th Cir. 2002). Where a contract represents a complete integration of the parties' intent, parole evidence is generally not admitted. Id.

In the present action, neither party contests that the settlement agreement represents a complete integration of the parties' bargain. Morrow's contentions regarding oral presentations made to him date after execution of the agreement. As unwritten modifications offered without further consideration from Morrow, these oral representations about the date of the City Council's consideration of the settlement agreement are not binding modifications of the written contract. See Cal. Civ. Code § 1698. The terms of the settlement agreement are clear and straight forward, laying out a clearly-bargained sequence of events. Firstly, Morrow was to sign a release which was to be held by the Magistrate judge. Agreement, ¶ 3. Secondly, the City's attorney was to encourage the Police Department to review the disposition of the Internal Affairs Investigation. Id. ¶ 4. Thirdly, if two specific events occurred—the Oakland City Council approved the Castaneda settlement and the Chief of Police changed the finding of the investigation to "unfounded" –the Magistrate judge was to deliver the original release agreement to the City and change in the investigative finding to Morrow.¶ 5. However, if either or both of these events did not occur, the release was to be returned to Morrow and rendered without force and effect. Id. ¶ 5; 7. Lastly, within fourteen days of the City's receipt of the Morrow's executed release agreement, the City was to pay Morrow $5,000. Id. ¶ 6.

Plaintiff argues an alternative interpretation of the language of the contract: namely that the $5,000 was consideration, due 14 days after April 20, 2004, for two things: his signature of the release and his willingness to wait 14 days for payment. He argues that because he signed the release, he was immediately entitled to the settlement award. He believes that if the City Council had refused to adopt the agreement, or the Chief of Police refused to change the disposition of the investigation, the release would be automatically rescinded and nevertheless plaintiff would retain the settlement award. Such a

reading of the contract is inconsistent with its plain meaning, the conduct of the parties, and the basic logic of the parties' bargain. In one provision, the agreement provides that the release signed by morrow was to be deposited with Magistrate Judge Zimmerman. In a separate provision, the agreement describes two requirements prior to the Judge delivering " the original executed Release Agreement" to the City: first that the City Council approve
the settlement and second that the Chief of Police change the disposition of the investigation. See Agreement, ¶¶ 3, 5. Whether or not the city received a photocopy of the release on the day that Morrow signed it is irrelevant, as they did not receive the original document until Morrow's condition had been met.

The City did not attempt to activate the release agreement- for instance by filing for dismissal of the present action in this court- until they had met their side of the bargain and met both of Morrow's conditions. The contract terms are thus not susceptible to plaintiff's proposed construction of the settlement agreement.

The contract represented a complete integration of the parties' bargain, and the terms of that agreement were clear on the face of the contract. No parole evidence, nor alleged subsequent oral modifications of the contract, are admissible.

III. Breach of the Contract Terms by the City

Upon performance of the two conditions precedent enumerated in the contract (the City Council's settlement adoption and the changed investigative finding), plaintiff became bound to abide by his signature on the " Full Release and Satisfaction of all Claims and Demand." The release states that Morrow " does hereby generally release and forever

discharge and hold harmless [defendants]...of all claims, demands, accounts, actions, causes of action..." This court will enforce the release agreement as written. Morrow has not yet breached the agreement and remains bound by its terms.

For their part, defendants remain bound by their promise to deliver $5,000 to Morrow. Under the terms of the agreement, plaintiff is entitled to $5,000 within fourteen days after the magistrate judge's executed delivery of the investigation's altered finding and release agreement, timing which has been disrupted by the present motion to rescind The City has not breached the settlement agreement and remains bound by its terms.

Magistrate Judge Zimmerman shall release both executed documents to the parties. Plaintiff will be entitled to his $5,000 settlement award within fourteen days of this event. No further legal claims from plaintiff against defendants will be entertained by this court, and plaintiff is advised that the settlement agreement and release he negotiated stand on solid legal ground. His pending actions are hereby dismissed with prejudice.

CONCLUSION

For the forgoing reasons, the court DENIES plaintiff's motion to rescind the settlement contract. The agreement is binding; the present action is dismissed in its entirety and with prejudice. The Clerk of the Court is directed to close the file on this action forthwith.

IT IS SO ORDERED.

Dated February 8, 2005 " S/ "

Marilyn Hall Patel
United States District Court Judge
Northern District of California

FILED
FEB- 8 2005

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANK MORROW, JR.
Plaintiff, No. C04-0315MHP

v. **JUDGMENT**

CITY OF OAKLAND, et. al.,
Defendants.
_____/

Plaintiff's motion to rescind the settlement agreement is DENIED. IT IS ORDERED AND ADJUDGED that plaintiff's action is dismissed in its entirety. The Clerk of the Court is directed to close the file on this action forthwith.

IT IS SO ORDERED AND ADJUDGED.

Dated:_____ "S/_____"

MARILYN HALL PATEL
United States District Court
Northern District of California

Appendix B-11

Argument 5- Mr. Roberts has agreed with Defendant that the restraining order which forms thdisputed *"consideration"* for the *Burnham and Brown Release* was imposed in violation of his Constitutional Rights

Opposing counsel have done their best to avoid addressing the fact that what they would like to call consideration (removal of the restraining order) was obtained in Defendant's Constitutional rights. In an e-mail dated June 8, 2004 (just 7 days after the Oakland City Council refused to settle his client's case), Mr. Roberts wrote City's Matthew Graham inquiring why the Oakland City Council didn't approve the *Castaneda settlement proposal.*[9] In this e-mail Mr. Roberts admits to the fact that Defendant has been ***"stripped of his Second Amended Rights."*** The record will reflect that Defendant was given no **notice or opportunity to be heard** on January 15, 2004, the day that his former attorney Claudia Leed committed malpractice by overstepping her authority and binding him to a restraining order as a condition of settlement without communicating it to him. See CA Business and Professions Code 6103.5 AS attorneys, Mr. Robert and Mr. Turley took oaths to uphold the Constitution. See California Business and Professions Codes 6067 and 6068. Surely, counsel must realize that case law requires that before a person can be ***stripped of any established right***, that they be given ***notice and opportunity to be heard***- see Penoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565, Board of Regents v. Roth, 408 U.S. 564 (1972). This is particularly true if the rights being taken are taken as a result of a restraining order. see Sinaloa Lake Owners assn v. City of Simi Valley, 882 F. 2d 1398 (9th Cir. 1989). Interesting, less than a month before violating Defendant's due process rights, Mr. Roberts advocated for the recognition of the *constitutional rights* of a man who he

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[9] see par. 2 of Dennis Roberts June 8, 2004 12:38 e-mail- Attach. 7

alleged was wrongfully deprived of some chickens. In pertinent part Mr. Roberts is quoted as stating:

"its really disgusting, " Animal-Control people are bound by the same constitution the rest of us are, and that means they need a warrant to come onto the property." [10]

Its amazing that a man who can argue with a straight face that wrongfully depriving a man of some chickens is disgusting can't seem to understand that wrongfully depriving a man of his career is equally disgusting. Mr. Roberts is simply not credible.

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[10] see Oakland Tribune May 23, 2003 article- ***" Lawyer cries foul over fowl seizures"*** – Attachment 25

III. THE MISCONDUCT OF DENNIS ROBERTS

A. Mr. Roberts has authored writing which suggested that racism played a part in his decision to violate Defendant's Constitutional rights

Defendant has personally witnessed Mr. Roberts openly using the word ***"nigger"*** as he told racial jokes in Defendant's and Mr. Turley's immediate presence. In his e-mail dated March 31, 2004, Mr. Roberts wrote the following racist comments about Ms. Leed:

"the bitch is a Yid who knows no Yiddish…Why doesn't she say I hate her because she is a KIKE. No, again, I hate her in spite of that fact…."(par. 6 p.3)

C. Mr. Roberts has authored writings which suggesting that his disdain for women played a part in his decision to violated Defendant's Constitutional rights

Throughout these proceedings, Mr. Roberts has presented himself as a person who has deep hostilities against women. In an e-mail dated Janaury 21, 2004[23] he stated the following about Mr. Leed:

" You know what hurt him more than the business with the security. His lawyer. I don't like her one stinking bit. When I first met her I called her " hon" or " sweetie" or something…..she got into this whole feminist " karate stance" and chewed my ass out in front of several other lawyers. A real feminist rap, blah, blah, blah. And I thought I'll pay this bitch back in spades….. I knew Frank was going down just so I could teach this big mouth stupid woman a lesson….." (par. 3 p. 1 3:33 AM e-mail)

After Ms. Leed complained to this court about Mr. Roberts e-mails of January 21, 2004 and this court ordered Mr. Roberts to stop sending them, Mr. Roberts sent another dated March 31, 2004. In it he stated the following about Ms. Leed:

" <u>STUPID COW!</u>...GIVE ME A FUCKING BREAK! HER REAL COMPLAINT SHOULD BE WORDED "I FUCKED UP SO I FIRST BEGGED ROBERTS TO SAVE MY PIMPLY ASS; THEN WHEN HE WOULDN'T BE SWAYED BY MY WHINNING, I STARTED TO THREATENING TO GET PATEL TO DISOLVE WHATEVER IT WAS SHE DID" ….TOUGH SHIT FRAKIE M'BOY….<u>THIS BULLET POINT SHOULD BE</u>

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[23] January 21, 2004 e-mails of Dennis Roberts- Attachment 22

SHOVED SO FAR UP HER ASS SHE MIGHT START THINKING THAT MAYBE A DICK ISN'T SUCH A BAD THING." (par. 5 p. 2)[24]

" Oh shit, I forgot....My responsibility is to bail this ugly cunt out of a mess of her own creation and that is now translated to some obligation I have as an officer of the court." (last par. P.2)

" What I'm waiting for her to say is that Mr. R. doesn't like me because I am a strong powerful feminist woman. So I can respond: Actually, I don't like you in spite of the fact that you are a strong powerful feminist woman. Now let's assume arguendo that i hast the dirt this bitch trods on. Do I not have good reason: I inadvertently called her hon and she gives me a nasty fifteen minute lecture on the RIGHTS OF WOMEN, etc, etc, etc" (par. 1 p. 3)

" ONE OF MY CLIENTS OF WHOM I AM PROUD TO HAVE REPRESENTED WAS ANGELA DAVIS....YOU WANT A HEARING YOU FUCKING IDIOT. I'LL HAVE ANGELA, PENNY , AND MAYBE EVEN SOME OF THE YOUNGER BAYWAR LADIES (THOSE TOO YOUNG TO REMEMBER HOW I SHIT ALL OVER THEM). NAH, SHE IS A PARANOID BITCH...(par. 2 p. 3)

" she is a miserable despicable bitch with a minus 19 on the personality chart. She is loathsome...." (par. 4 p. 3)

On June 16, 2004, Mr. Roberts sent another e-mail to the office of Jeffrey Neustadt regarding his disdain for Claudia Leed. In pertinent part he wrote:

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[24] This particular caustic reference was a cheap shot concerning Ms. Leed's sexual orientation and lifestyle. **Defendant's criticism of Ms. Leed have never went beyond her professional performance or lack thereof. Mr. Robert's behavior has been disgusting.**

" I'm still taking cheap shots at Claudia. I cannot believe Zimmy (ref. The Honorable Magistrate Bernard Zimmerman) didn't fuck her in the ass for that play…."

Even Ms. Castaneda hasn't been spared Mr. Robert's attacks as evidenced by his admitted references to her a ***"liar, a cunt, a hooker, and a drunk," (par. 5 p. 3).*** Mr. Robert's defiant attitude towards Judge Hamilton, his attacks on Mr. Leed, and his attacks on his client, all demonstrate that he has extreme disdain for women who disagree with him. He particularly demonstrates his apparent hatred and disrespect of women by disgustingly characterizing them as ***cunts, hookers, bitches,*** and making references how they should have things inserted in orifices of their bodies because they disagree with him. Defendant is unaware that Mr. Roberts has ever made similar disgusting references about men he's disagreed. With Defendant has refuted a number of baseless allegations Ms. Castaneda has made and has acquired evidence that suggest that she may be an alcohol abuser. Defendant concurs with Mr. Robert's description of Ms. Castaneda as a drunken liar but is appalled by his description of her as a cunt, and a hooker.

F. The reasons Mr. Roberts cite for obtaining a retraining order against Defendant constitute an abuse of the civil process

Mr. Robert's relayed e-mails explaining why he obtained a restraining order against Defendant. In his e-mail of January 21, 2004 Mr. Robert's stated:

"am I pissed at Frank, You bet...When he came into the federal bldg and said hello to me at the security- and I couldn't get in because someone had stole my wallet and I had no bar card but only had a 1987 CA driver's license...I said to him, " hey help me out (he knew one of the security guys but didn't do anything) and he blew me off" ...I was pissed that he didn't help me...I thought to myself- I'll teach this prick a lesson...I believe that revenge is a dish best served cold. You do me in, I'll pay you back not today but 10 years from now so you'll never no where it came from....I suddenly had an opportunity to pay him back without waiting. I pulled that restraining order out of the back of my head." ...I knew that the restraining order would screw him over bigger than any $85,000.00 hit the city took...It had nothing to do with Griselvia. If he saw her he'd run in the other direction. I know that- and you said that. It's true he would run as fast as he could from her...I never discussed it with her. It was my own little "F" you Frank...
(par. 5 p. 1 2:27 AM e-mail)

" You know what hurt him more than the business with the security. His lawyer. I don't like her one stinking bit. When I first met her I called her " hon" or " sweetie" or something.....she got into this whole feminist " karate stance" and chewed my ass out in front of several other lawyers. A real feminist rap, blah, blah, blah. And I thought I'll pay this bitch back in spades..... I knew Frank was going

down just so I could teach this big mouth stupid woman a lesson….." (par. 3 p. 1 3:33 AM e-mail)

As described in his signature foul mouthed manner, Mr. Roberts saw having a restraining order imposed on Defendant as a way to embarrass Ms. Leed. As he stated it was ***" A chance to shove it to this bitch – so Frank and the Union would go ballistic and raise hell…" (par. 4 p. 1)***

In his e-mail dated March 31, 2004, Mr. Roberts sated the following:

" I confess: I am intemperate; I do exaggerate, and I sure can piss you off if I don't like you. Would it be fair to say " I pulled the restraining order out of my ass" to let her know that Frank was represented by an idiot who should be immediately kicked to the curb. Well guess what- Frank is such a Yeshiva Bucher he figured it out all by himself…" (par. 4 p. 3)

Mr. Roberts e-mails sufficiently explain in his own words how he duped this court into receiving a restraining order against Defendant violating his Constitutional rights. Defendant is informed that an attorney who deceived a court may be guilty of a misdemeanor. see California Business and Professions code 6128.

FILED
SEP 20 2005

RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK MORROW, JR.
Plaintiff,

No. C-05-00270 MHP

MEMORANDUM & ORDER

v.

CITY OF OAKLAND, et al.,
Defendants.
_____/

On January 18, 2005, plaintiff Frank Morrow filed the instant lawsuit, alleging violation of 42 U.S.C. section 1983 and various state law torts. Now before this court are defendant City of Oakland's motion to dismiss, defendants Dennis Roberts and Paul Turley's motion to dismiss, defendants Claudia Leed and John Verber's motion to dismiss, Morrow's motion for injunctive relief, and Morrow's motion for entry of default judgment. After considering the parties' arguments and submissions, and for the reasons set forth below, the court rules as follows.

BACKGROUND

This lawsuit is the third in a series of related actions. In the first lawsuit, No. C 02-5358 MHP (filed May 16, 2001 and removed to this court on November 11, 2002), Morrow was

accused by a member of the public, Griselvia Castaneda, of attempted sexual assault during the course of her arrest. The first lawsuit settled on March 31, 2004; this court has considered and grants Castaneda's motion to enforce the March 31, 2004 settlement agreement in a separate order issued today.

In the second lawsuit, No. C 04-0315 MHP (filed February 11, 2004), plaintiff, proceeding pro se, alleged under 42 U.S.C. sections 1983 and 1985 that defendants' handling of the internal investigation surrounding Ms. Castaneda's allegations violated his First Amendment right to free speech, Fourth Amendment right to be free from unreasonable searches and seizures, and Fourteenth Amendment right to equal protection. In addition, he brought nine pendent state law causes of action. The second lawsuit settled on April 20, 2004, and this court denied Morrow's motion to rescind the April 20 settlement agreement on February 8, 2005.

The April 20 settlement agreement provides, in part, that Morrow releases " defendants CITY OF OAKLAND....and their respective agents [and] attorneys" from liability for claims arising out of or related to either the first lawsuit or the second lawsuit. Def. City of Oakland's Exh. B (April 20, 2004 Release), at Preamble. In upholding the validity of the April 20 settlement, this court noted that " [n]o further legal claims from plaintiff against defendants will be entertained by this court, and plaintiff is advised that the settlement agreement and release that he negotiated stand on solid legal ground." Memorandum & Order, No. C 04-0315 MHP, slip op. at 7 (Feb. 8, 2005).

The instant action is the third lawsuit, filed on January 18, 2005. In the complaint for this lawsuit, plaintiff alleges several additional violations of 42 U.S.C. section 1983: that the

City of Oakland and its attorney (the "City Defendants") denied his First Amendment right to freedom of speech, his Fourteenth Amend right to due process, and his Fourteenth Amendment right to equal protection. Complaint ¶ 146. Plaintiff also alleges seven state law torts, including abuse of process, intentional infliction of emotional distress, and fraud, against the City Defendants and the various private attorneys involved in the first two actions.

The gravamen of plaintiff's current section 1983 claims is that the City Defendants failed to represent plaintiff's individual interest in connection with the first lawsuit. Specifically, plaintiff alleges that the City Defendants improperly accepted service, allowed removal to federal court, and responded to discovery request on plaintiff's behalf; that the City Defendants continued to represent plaintiff despite the existence of a conflict of interest between plaintiff and the City of Oakland; and that the City Defendants failed to keep plaintiff informed of his involvement in the lawsuit. Complaint ¶ ¶ 11, 29, 32, 37-38, 42,48,56,58,71, and 127. All of the alleged failures in representation took place prior to plaintiff's agreement to settle the second lawsuit on April 20, 2004.

LEGAL STANDARD

I. Res Judicata

The doctrine of res judicata, or claim preclusion, prohibits litigation in a subsequent action of any claims that were raised or could have been raised in a prior action. Owens v. Kaiser Found Health Plan, Inc., 244 F. 3d 708, 713 (9th Cir. 2001)(citations omitted) Under Ninth Circuit law, an adjudication in a prior action serves as a bar to litigation of a claim if the prior adjudication (1) involved the same claim as the later suit; (2) reached a final judgment on the merits and (3)

involved the same parties of their privies. Id.; see also Blonder-Tongue Labs. V. University of Ill. Found., 402 U.S. 313, 323-24 (1971).

In determining whether two claims are identical, the Ninth Circuit employs four criteria: namely, (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right and (4) 1405 (9th Cir. 1993); Costantini v. Trans World Airlines, 681 F. 2d 1199, 1201-02 (9th Cir.), cert. denied, 459 U.S. 1087 (1982) (quoting Harris v. Jacobs, 621 F. 2d 341, 343 (9th Cir. 1980)). The fourth criterion- whether the two suits arise out of the same transaction- is the most important. Id. At 1202.

It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought. C.D. Anderson & Co. v. Lemos, 832 F. 2d 1097, 1100 (9th Cir. 1987).

DISCUSSION

Although Morrow's complaint includes numerous causes of action, the subject matter jurisdiction of this court depends on Morrow's section 1983 claims against the City Defendants. The court will therefore first consider the viability of these claims.

I Res Judicata

Defendants argue that plaintiff's section 1983 claims are precluded in light of the April 20, 2004 settlement, which

this court upheld on February 8, 2005. Plaintiff argues that the April 20 settlement agreement involved different parties and different issues from those in the present lawsuit, and that preclusion is therefore inappropriate.

A. Final Judgment

It is settled law that dismissal of an action with prejudice pursuant to settlement agreement constitutes a final judgment on the merits and precludes parties from reasserting the same claim in a subsequent action. In re Dominelli, 820 F. 2d 313, 316-17 (9th Cir. 1987). This court dismissed the claims in the second lawsuit with prejudice and entered judgment on February 8, 2005, based on the April 20 settlement. The February 8 judgment is thus a final judgment for purpose of res judicata.

B. Same Parties of Their Privies

Res judicata binds parties to the previous lawsuit and their privies. Owens, 244 F. 3d at 713. Both Morrow and the City of Oakland were parties to the previous two lawsuits and are barred from relitigating the same claims. The fact that the other City Defendants- the Oakland city named in this lawsuit- were not parties to the previous lawsuits is irrelevant as they are seeking to preclude claims that Morrow has now brought. The relevant question is whether Morrow is bound by the previous judgment, and he undoubtedly is.

C Same Claim

Finally, res judicata bars litigation of not only those claims actually litigated in the previous lawsuit, but " all claims that could have been asserted." International Union, 994 F. 2d at 1430. The critical inquiry is whether the allegations in the subsequent lawsuit arise out of the same transaction as the

previous lawsuits. Id. Here, all of the facts alleged by Morrow in support of his section 1983 claims predate the April 20 settlement and pertain to the City of Oakland's conduct in defending Morrow in the first lawsuit. Morrow has already pursued a lawsuit challenging another aspect of the City of Oakland's conduct during the first lawsuit- the manner in which Oakland handled the internal investigation of Morrow. Both alleged wrongs flow from the City Defendants' handling of the first litigation and thus arise from the transaction.

It is also clear that allowing this lawsuit to proceed would impair the rights established by the April 20 settlement, see id., in which Morrow agreed to refrain from any further litigation against the City of Oakland and its attorneys on claims "related" to the first two lawsuits. Def. City of Oakland's Exh. B (April 20, 2004 Release), at Preamble. The City Defendants' conduct in defending Morrow in the first lawsuit is undoubtedly "related" to that lawsuit , and is thus covered by the language of the April 20 agreement. Morrow had knowledge of the alleged wrongful conduct at the time he entered into the April 20 agreement, as evidenced by his decision to retain separate counsel during settlement negotiations for the first lawsuit. See Defs. Leed & Verber's Exh. A (March 31, 2004 Substitution of Counsel). Morrow is therefore deemed to have taken that conduct into consideration at the time he settled. See Goldman v. Northrop Corp., 603 F.2d 106, 109 (9th Cir. 1979) ("While the claims in the present suit were not the subject of the ...complaint, they were taken into consideration during the negotiations leading to the settlement and the settlement and ultimate judgment took them into account").

Thus Morrow's section 1983 claims in this lawsuit are barred by the final judgment in the second lawsuit.

IV. Enforcement of Settlement Agreement

In addition to being precluded under principles of res judicata, Morrow's claims are barred as a result of his contractual obligations under the April 20, 2004 settlement agreement. This court has power to enforce the terms of valid settlement agreements. In re City Equities Anaheim, Ltd. V. Lincoln Plaza Development Co., 22 F. 3d 954, 958 (9th Cir. 1994). The April 20 agreement on its face forecloses any litigation against the City Defendants on claims related to the first two lawsuits, including the section 1983 claims raised in this lawsuit. Those claims are therefore dismissed with prejudice.

IV. STATE LAW CLAIMS

Plaintiff has raised a number of claims arising under state law, including intentional infliction of emotional distress; negligent infliction of emotional distress; abuse of process; fraud; defamation; and malpractice.

Under 28 U.S.C. section 1367, the statutory source of this court's supplemental jurisdiction over state law claims, federal courts "have supplemental jurisdiction over all other claims that are so related to claims in the action... that they form part of the same case or controversy." 28 U.S.C.§1367(a). A district court may, however, decline to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C.§1367(c)(1). None of the parties has raised a jurisdictional grounds for dismissing the present action, however as a matter of federal policy, this court is "duty bound" to take the exercise of discretion over supplemental claims under 1367(c) very seriously, and indeed to consider such an issue *sua sponte* if necessary. See Acri v. Varian Associates, Inc., 114 F. 3d 999, 1001(9th Cir. 1997).

It is well settled law that " in the usual case in which all federal- law claims are eliminated before trial, the balance of factors... will point toward declining to exercise jurisdiction over the remaining state law claims." See Acri, 114 F. 3d at 1001 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7 (1988)). The Ninth Circuit has identified the relevant factors for a determination of discretionary supplemental as judicial economy, convenience, fairness and comity. Acri, 114 F. 3d at 1001(citing
United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966)). " Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." Gibbs, 383 U.S. at 726.

In the instant case, this court finds that the values of " judicial economy, convenience, fairness, and comity" weigh in favor of dismissal without prejudice of Plaintiff's state law claims. Plaintiff has presented a diverse set to state law claims which- if indeed they are still viable in light of the clear and broad settlement agreement in the second lawsuit- will be more efficiently handled in state court. Therefore, the Court declines to exercise supplemental jurisdiction over plaintiff's state law claims and dismisses any state law claims in the complaint without prejudice.

CONCLUSION

For the foregoing reasons, the court GRANTS defendants' motions to dismiss and DENIES plaintiff's motions for injunctive relief and for entry of default judgment. The Clerk of the Court is directed to close the file on this action forthwith.

IT IS SO ORDERED

Dated: September 20, 2005 "S/ /_____"

Marilyn Hall Patel
United States District Court Judge
Northern District Court of California

ENDNOTES

1. The order in this case should be read together with the order filed this date in C 02-5358 MHP.

FILED SEP 20 2005
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GRISELVIA CASTANEDA
Plaintiff,

No. C 02-5358 MHP

v.

MEMORANDUM AND ORDER

CITY OF OAKLAND, and
FRANK MORROW, JR.,
Defendants.
_____/

On March 31, 2004, plaintiff Griselvia Castaneda and defendants Frank Morrow and the City of Oakland executed a settlement agreement to resolve Castaneda's complaint, pursuant to 42 U.S.C. section 1983, of sexual assault by Frank Morrow as an on-duty police officer for the City of Oakland. Now before this court is plaintiff's motion to enforce the settlement agreement and for attorneys' fees. In addition, Morrow, proceeding pro se, has brought motions for "due process hearings," for sanctions against Castaneda's attorneys, Dennis Roberts and Paul Turley, for partial summary judgment on Castaneda's section 1983 claim, and to quash service of the original complaint. After considering the parties' arguments

and submissions, the court rules that the settlement agreement is binding between the parties and that further proceedings in this litigation will not be granted.

I. Motion to Enforce the Settlement Agreement

In a series of settlement conferences in the spring of 2004, Magistrate Judge Zimmerman resolved the present action, as well as a related case, Morrow v. City of Oakland, C-04-315 MHP. The focus of the settlement conference of March 31, 2004, at which defendant Morrow was personally present, was the removal of a contractually agreed upon " stay away order" and final resolution of Castaneda's claims against Morrow. The agreement dismissed with prejudice Castaneda's claims, extinguished the stay away order, and required mutual release of all claims by all parties. In addition, the agreement provided for a financial settlement for plaintiff that included payment by a law firm, Burnham and Brown. This payment was conditioned on a release of legal malpractice claims against the law firm by Morrow and his attorneys. Morrow agreed to the terms of the settlement during the conference, but he has since refused to sign the release of legal malpractice claims. Burnah & Brown therefore has refused to pay the sum of money due to Castaneda.

A District Court has inherent power summarily to enforce a settlement agreement with respect to an action pending before it. In re City Equities Anaheim, Ltd. v. Lincoln Plaza Development Co., 22 F. 3d 954, 958 (9th Cir. 1994). A settlement agreement must meet to requirements in order to be enforceable: (1) it must be a completed agreement and (2) both parties must have either agreed to the terms of the settlement or authorized their respective counsel to settle the dispute. See Callie v. Near, 829 F. 2d 888, 890-891 (9th Cir. 1987); Harrop v. Western Airlines, Inc. , 550 F.2d 1143, 1144-45 (9th Cir. 1977). Oral settlement agreements can be binding on the

parties where the person entering the agreement has settlement authority. Harrop, 550 F. 2d at 1145. Where material facts concerning the existence or terms of an agreement to settle are in dispute, the Court must hold an evidentiary hearing. Callie, 829 f. 2d at 890.

Defendant advances several arguments for rescission of the settlement agreement. First, he believes that the settlement conference was premised on an illegally or illegitimately obtained stay away order. Morrow argues that Dennis Roberts sought this order not because it was legally necessary to protect Roberts' client,

but because he harbored personal hostility to defendant and defendants' attorney. Indeed, Morrow has submitted as evidence two e-mails authored by Roberts in which Roberts used language and expressed intentions that were well beyond the realm of professional ethics and impugn the integrity of the settlement terms he sought on Castaneda's behalf. Unseemly though it was, this episode does not warrant rescission of the March 31, 2004 settlement conference. Morrow was personally present at this conference, at which the parties agreed to extinguish the stay away order and all prior disputes between parties. In essence, attorney Dennis Roberts' egregious conduct did not invalidate the settlement executed on March 31, 2004 because the settlement was renegotiated *on the basis of Robert's conduct*, and Morrow agreed to the terms of that resolution. By obtaining the release of Castaneda's claims and extinguishing the stay away order, Morrow received consideration for his agreement to release legal malpractice claims against his attorneys. There was nothing about this release agreement that " shocks the conscience" and warrants a finding of unconscionability, nor is it contrary to public policy, as Morrow avers.

Morrow's second argument for rescission is similarly unavailing. He contends that the parties agreed to a settlement term providing that they could "negotiate a different deal" if the Castaneda settlement was refused by the Oakland City Counsel. The Oakland City Counsel did indeed approve the settlement agreement, albeit much later than expected, and thus this term was not triggered.

Thirdly, Morrow argues that this court's order of February 8, 2005 revoked his right to sue his counsel, thus effectively providing plaintiff with the relief presently sought. At that time, this court refused rescission of the settlement agreement reached in the resolution of the related case Morrow v. City of Oakland, in which Morrow has filed an appeal. See Morrow v. City of Oakland Memorandum and Order, C 04-0315 (N.D. Cal. Feb. 8, 2005)(Patel, J.) (denying plaintiff Morrow's motion to rescind the settlement contract entered on April 20, 2004). In that order, this court found Morrow bound by the terms of a settlement agreement reached on April 20, 2004 and contingent on the terms of the March 31, 2004 agreement.

The court therefore finds that the parties have reached an enforceable settlement agreement. The agreement was complete; the parties and their counsel agreed to its terms. There are no material facts in dispute that would require an evidentiary hearing, nor any legal reason why rescission would be warranted as a matter of contract law. The agreement is enforceable as written and as agreed to by Morrow who was of sound mind on March 31, 2004. Morrow s ordered to execute the settlement agreement and sign any and all papers and released related thereto.

II. Plaintiff's Request for Attorney's Fees

In cases governed by statutes authorizing the award of attorney's fees to prevailing parties, the Supreme Court has held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees. See Buckhannon B. and Care Home, Inc. v. West Virginia, 532 U.S. 598, 604 (2001). Castaneda's claims are governed by such a provision, as 42 U.S.C. section 1988 authorizes prevailing parties to recover attorney's fees in civil rights actions. The award of fees under this provision, however, is vested in the discretion of the district court. See 42 U.S.C § 1988(b). Under the peculiar circumstances of this case, in which the attorney claiming fees authored statements that radically impugned the ethics of his legal representation in this case, attorney's fees would be entirely inappropriate. Plaintiff's counsel's request for attorney's fees is denied.

III. Defendant's Motions for Due Process Hearings, for Sanctions, for Summary Judgment, and to Quash Service

Defendant's motions for due process hearings, for sanctions, for partial summary judgment, and to quash service are denied. For the reasons enumerated above and in this court's order of February 8, 2005, the settlement agreements entered in the present action were enforceable, and defendant is not entitled to a hearing to challenge them. Nor is defendant entitled to reopen the question of his liability or participation in the lawsuit. These questions were resolved by the binding and valid final settlement agreement.

CONCLUSION

For the forgoing reasons, the court GRANTS plaintiff's motion to enforce the settlement agreement of March 31, 2004 and DENIES all other pending motions. The parties shall

negotiate the anticipated release and finalize the settlement within the next thirty days. Morrow is instructed to sign any and all settlement agreements and other documents necessary to effectuate the settlement in accordance with this order and the order in C 05-00270 MHP.

Because there is an enforceable settlement agreement already in place, it is ORDERED that this case be and the same is hereby DISMISSED.

IT IS SO ORDERED

Dated: September 20, 2005 " S/_____ "
Marilyn Hall Patel
United States District Court Judge
Northern District of California

ENDNOTES

1. It should be noted that Morrow has been a police officer in the Oakland Police Department for approximately twelve years and is a law school graduate.

2. The order in this case should be read together with the order filed this date in C 05-00270 MHP

FILED
AUG 28 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK MORROW, JR.,
Plaintiff- Appellant
v.
CITY OF OAKLAND,
Defendant-Appellee.

No. 05-15499
D.C. No. CV-04-00315-MHP
MEMORANDUM

GRISELVIA CASTANEDA,
Plaintiff- Appellee,
v.
FRANK MORROW JR., Police Officer,
Defendant- Appellant,
CITY OF OAKLAND,
Defendant- Appellee,
and
DENNIS ROBERTS; et al.,
Defendants.

No. 05-17047
D.C. No. CV-02-05358-MHP

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

FRANK MORROW, JR.,
Plaintiff-Appellant,
v.

CITY OF OAKLAND, CALIFORNIA;
et al.,
Defendants-Appelees.
_____/

No. 05-17061
D.C. No. CV-05-00270-MHP

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Submitted August 21, 2006**

Before: GOODQIN, REINHARDT, and BEA, Circuit Judges

In these three pro se appeals, Oakland Police Officer Frank Morrow Jr. appeals from the district court's orders dismissing, pursuant to settlement, Griselvia Castaneda's civil rights action against Morrow and the City of Oakland ("City"), and Morrow's own civil rights actions arising from the handling of Castaneda's complaint

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's interpretation of a settlement agreement, " with due respect for the district court's superior perspective." *Congregation ETZ Chaim v. City of Los Angeles*, 371 F. 3d 1122, 1124 (9th Cir. 2004). We review for abuse of discretion the district court's decision to enforce a settlement agreement. *Doi v. Halekulani Corp.*, 276 F. 3d 1131, 1136 (9th Cir. 2002). We affirm.

The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The district court properly enforced the March 31, 200 settlement agreement between Castaneda and Morrow and the City (" the *Castaneda settlement"*) because Morrow, assisted by counsel of his own choosing, acknowledged and accepted the key terms of the agreement before the settlement judge. *See Doi,* 276 F. 3d at 137-39. For the same reasons, the district court properly enforced the April 20, 2004 settlement agreement between Morrow and the City. There is no support in the plain language of either settlement for Morrow's contention that the *Castaneda* settlement had to be approved by a certain amount of time. *See* Cal. Civ. Code § 1657 ("If no time is specified for the performance of an act required to be performed, a reasonable time is allowed.").

The district court properly concluded that the federal claims in Morrow's second action against the City were precluded by both res judicata and the contractual obligations imposed by the settlement of his fist action. *See Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 322 F. 3d 064, 1077-83 (9th Cir. 2003) (applying elements of res judicata); *Int'l Union of Operating Eng'rs v. Karr,* 994 F. 2d 1426, 1429 (9th Cir. 1993)(applying res judicata to dismissal pursuant to settlement).

The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over Morrow's state-law claims. *See* 28 U.S.C. § 1367 (c)(3) (district court may decline supplemental jurisdiction if it has " dismissed all claims over which it has original jurisdiction"); *Acri v. Varian Assocs., Inc.* 114 F. 3d 999, 1001 (9th Cir. 1997) (en banc) (describing factors district court should consider in declining supplemental jurisdiction).

Morrow's remaining contentions lack merit.

The parties shall bear their own costs on appeal.

No. 05-15499 AFFIRMED

No. 05-17047 AFFIRMED

No. 05-17061 AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MORROW, JR., Plaintiff-Appellant, v. CITY OF OAKLAND, Defendant-Appellee.

No. 05-15499
D.C. No. CV-04-00315-MHP

JUDGMENT

GRISELVIA CASTANEDA, Plaintiff-Appellee, v. FRANK MORROW, JR., Police Officer, Defendant-Appellant, CITY OF OAKLAND, Defendant-Appellee, and DENNIS ROBERTS; et al., Defendants.

No. 05-17047
D.C. No. CV-02-05358-MHP

FRANK MORROW, JR., Plaintiff-Appellant, V CITY OF OAKLAND, CALIFORNIA; et al., Defendants- Appellees

JUDGMENT

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record form the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, the judgment of the said District Court in this cause be, and hereby is

AFFIRMED.

Filed and entered Monday, August 28, 2006

Nos. 05-15499
5-17047
05-17061

IN THE UNITED STAES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MORROW JR.
Plaintiff-Apellant
v.
CITY OF OAKLAND, et al.
Defendants-Appellees
v.
CITY OF OAKLAND, and DENNIS ROBERTS, et al.
v.
Defendant-Appellees
v.
CITY OF OAKLAND, et al.
Defendant-Appellees

On Appeal From the United States District Court For the
Northern Division of California

PETITITION FOR PANEL REHEARING
AND REHEARING EN BANC

Frank Morrow Jr.
1323 Discovery Bay Blvd
Discovery Bay, CA 94514
Pro Se Appellant

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I.INTRODUCTION AND STATEMENT

Frank Morrow Jr, appellant in Morrow v. City of Oakland, et. al, No. 05-15499; Castaneda v. Frank Morrow Jr. No. 05-17047; Morrow v. City of Oakland, et al., No. 05-17061, seeks rehearing en banc of the August 28, 2006 Panel decision (Goodwin, Reinhardt, and Bea) concerning issues of national significance under 28 U.S.C. 1447, 28 U.S.C. 455(a) and this Circuit's application of res judicata to support the dismissal of Appellant's two Title VII cases. Rehearing en banc is necessary for this Circuit to maintain uniformity of its decisions, and decisions of the Supreme Court. Further the matters herein substantially affects rules of national application and congress's scheme for uniformity in their application.

The Panel erroneously held 1) the district court properly enforced the March 31, 2004 settlement agreement between *Castaneda, Morrow, and the City(the Castaneda Settlement)* in case No. 02-05358 MHP simply because Appellant was assisted by counsel of his own choosing, acknowledged, and accepted the key terms of the agreement before the settlement judge; 2) for the same reasons as its enforcement of the March 31, 2004 settlement agreement that the district court properly enforced the April 20, 2004 settlement agreement in *Morrow v. City of Oakland, et al.* *(Morrow I* district Court Case No. 04-00315 MHP); 3) that the claims in *Morrow v. City of Oakland, et al, and Dennis Roberts, et. al. (Morrow II case* 05-00270 MHP) were precluded by both res judicata, and the contractual obligation imposed by the settlement of Appellant's first action *Morrow v. City of Oakland, et al.(Morrow I case* 04-00315); ;and 4) the district court

did not abuse its discretion in declining to exercise supplemental jurisdiction over *Morrow's* state law claims in Appellant's Case No. 05-00270 MHP.

Appellant seeks rehearing en banc regarding the improper interpretation of 28 USC 1447 (c), and 28 USC 455(a) and application of res judicata to his claims.

The rehearing en banc of the first two issues is required because the Panel's decision overlooks established law and directly conflicts with prior decisions of this Circuit and Supreme Court on issues of exceptional importance. The Panel's Opinion, if allowed to stand, impairs the integrity to Congress's schemes of 1) ensuring that courts of limited jurisdiction properly exercise subject matter jurisdiction and 2) ensuring that federal judges whose impartiality might *reasonably be questioned* recuse themselves.

The Panel's failure to recognize the district court's non-discretionary self executing duties under 28 USC 1447 (c), and 28 USC 455 (a), and its failure to apply these statutes to the facts of Appellant's cases contravenes well-settled principles of statutory construction advanced by this Circuit requiring that statutes be interpreted in a manner that gives meaning to all of their provisions, *Wilshire Westwood Assoc. v. Atlantic Richfield* 881 F. 2d 801, 804 (9th Cir. 1989).

Finally, the Panel failed to reach any conclusion concerning whether or not the district court's exercise of supplemental jurisdiction over Appellant's state law claims in 04-00315 was permissible after it decided Appellant had no federal cause of action, and after it decided that the district court did not err by exercising supplemental jurisdiction in Appellant's 05-00270 if the state claims that case were also barred by res judicata.

II. PETITION FOR REHEARING EN BANC

1. **The Panel's Opinion Nullifies 28 USC 1447 and departs from the Courts *International Primate Protection v. Administrators of Tulane Educ. Fund,* 500 U.S. 72, 87-89 (1991), and this Circuit's opinion in *Bruns v. National Credit Union Admin.,*122 F. 3d 1251 (9th Cir. 1997)(both holding that section 1447 (c) is mandatory)**

28 USC 1447 (c) commonly known as the " remand statute" reads:

"if at any time before final judgment ***it appears*** *that a district court lacks subject matter jurisdiction the case shall be remanded"*

On November 1, 2004 proceeding in the *Castaneda Case* where Appellant's 04-00315 case became an issue of discussion the judge did more than imply Appellant had no viable federal claims:

" if it's on the merits (ref Appellant's No. 04-00315) at best, you might have something left for state court, ..."[11]

On February 7, 2005 Appellant attended the final proceeding for *Morrow v. City of Oakland, et al.,* 04-00315, when the judge stated[12]:

---

[11] See pg. 10 Nov. 1, 2004 proceeding transcript case -2-5358 docket 73-74 Circuit 05-17047

[12] see pgs. 6,8 of February 7, 2005 proceeding transcript case 04-00315

The Court: " You know what? Your underlying complaint does not state any federal claim. I told you that the last time you were here." (ref. Nov. 1, 2004)

The Court: *" .....The Claims that you filed in this court are not federal claims..."*

Appellant's 04-00315 was settled on February 8, 2005. These comments by the judge demonstrate that as early as November 1, 2004, over two months prior to the entry of its order enforcing 04-00315, and dismissing Appellant's state and federal claims, the court knew there were no federal issues and knew it lacked subject matter jurisdiction. Because the court specifically held that there was no federal cause of action then

cont. 3

pursuant to 28 USC 1447 (c) the court had no subject matter jurisdiction and was obligated to remand Appellant's case to state court where it was originally filed.

As the Court held in *Ex parte McCardle,* 74 U.S. (7 Wall..) 506 19 L. Ed. 264 (1868), and has consistently held " *without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."* Id. at 514; *American Fire and Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951); *International Primate Protection League (supra)* (1991). This Circuit's holding in *Bruns,* as other circuits, is consistent with the Court's opinion that a district court judge's duty under 28 U.S.C. 1447 (c) is non-discretionary. *Toumajian v. Frailey,* 135 F. 3d 648, 655 (9th Cir. 1998); *Wernick v. Mathews,* 524 F. 2s 543, 545 (5th Cir.; 1975); *University of Ala. v. American Tobacco Co.,* F. 3d 405, 410-411 (11th Cir. 1990).

The Panel clearly failed to realize that the district court did not abide by the mandates of 28 USC 1447 (c).

A. 28 USC 1447 (c) imposes a non-discretionary self executing duty on a federal judge to consider whether or not it has jurisdiction to proceed

Though not an attorney, Appellant, in his pro se status, now understands that the court is duty bound to initially determine subject matter jurisdiction. *Hajek v. Burlington Line R..R. Co.,* 18 F. 3d 1105, 1107 (9th Cir. 1999). In *Jackson v. Seaboard Coast Line R.R.* this Circuit held that

" *The jurisdiction of a court over the subject matter of a claim involves the court's competency to consider a given type of case, and cannot be waived or otherwise*

conferred upon the court by the parties. Otherwise, a party could work a wrongful extension of federal jurisdiction and gives a district court power the

Congress denied them." Exparte McCardle; *Jackson v. Seaboard Coast Line R.R.*, 678 F. 2d 992, 1000-01 (11th Cir. 1982) (quoting *American Fire & Cas. Co. v. Finn*, 341 U.S. at 18). This Circuit has held that the defense of lack of subject matter jurisdiction cannot be waived, and that the court is under a continuing duty to dismiss an action whenever *it appears* that the court lacks jurisdiction. *Augustine v. United States*, 704 2d 1074, 1077. Other circuits have reached similar results. *Fitzgerald v. Seaboard Sys. R.R.*, 760 F. 2d 1249, 1251 (11th Cir. 1985) (per curium); *Wernick*, 524 F. 2d at 545; *Save the Bay, Inc. v. United States Army*, 639 F. 2d 1100, 1102 (5th Cir. 1981) (per curiam), holding that courts must constantly examine the basis of their jurisdiction before proceeding to the merits. The Panel clearly failed to recognize that the district court failed to perform its duty to remand.

B. The district court and the Panel erred by failing to defer to Congressional intent

Congressional intent for protecting the sovereignty of state courts to resolve disputes is so apparent that when Congress enacted 28 USC 1447 (c) they deliberately placed language in the statute requiring remand if it *appears* that the court does not have subject matter jurisdiction. This Circuit has granted rehearing where its been found that the court under review acted contrary to congressional intent. *Kuntz v. Reese*, 785 F. 2d 1410, 1410-1411 (9th Cir. 1986).

Because removal jurisdiction raises significant federalism concerns, the Supreme Court has consistently directed lower courts to strictly construe 28 USC 1447. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941). Other circuit have followed suit, with some holding that any doubt concerning jurisdiction should be resolved in favor

of remand to state court. *Burns v. Windsor Ins. Co.,* 31 F. 3d 1092, 1095 (11th Cir. 1994)(citing *Boyer v. Snap-on Tools Corp.,* 913 F. 2d 108 (3rd Cir. 1990); *Coker v. Amoco Oil Co.,* 709 F. 2d 1433 (11th Cir. 1983). On hearing en banc, the Fifth Circuit held that the district court erred when it dismissed a case without first examining its subject matter jurisdiction. *Marathon Oil Co. v. Ruhrgas,* 145 F. 3d 215, 220 (5th Cir. 1998), holding the court's duty to remand exist even if there are motions pending. This Circuit has given the same to the mandatory remand statute. *Toumajian v. Frailey,* 135 F. 3d 648, 655 (9th Cir. 1998). The Court has consistently held that limits on federal jurisdiction must neither be disregarded or evaded. *Owen Equipment & Erection Co. v.Kroger,* 437 U.S. 365, 374, 98 S. Ct. 2396 (1978).

By this Circuit's decision in *Wilshire,* this Circuit is required to give full effect to every provision of 28 USC 1447, and interpret provision (c) in the plain, clear language which it is written in. *Wilshire Westwood Assoc.*, 881 F. 2d 801, 804 (9th Cir. 1989). The Panel clearly erred by failing to defer to congressional intent, the Court's rulings, and Circuit precedent.

C. The Panel failed to realize that as a matter of law remand was mandated

This Circuit has granted rehearing when it has found that a district court's opinion is inconsistent with statutory, Supreme Court or Ninth Circuit authority. *Carter v. Derwinski,* 987 F. 2s 611, 613-615 (9th Cir. 1993)(en banc).

On page 4 of the district court's September 20, 2005 order pertaining to Appellant's *Morrow II* (Case 05-00270), the district court referring to its February 8, 2005 order enforcing the settlement of *Morrow I* (case 04-00315) held-

" The February 8 judgment is thus a final judgment for purposes of res judicata."

Appendix G-15

The problem with the district court's enforcement of 04-00315 is that by its own admission prior to its enforcement it had no subject matter jurisdiction. It 28 USC 1447 (c) is strictly interpreted as Congress intended, and as this Circuit and the Supreme Court have strictly interpreted it then this Circuit must find that the district court had no subject matter jurisdiction and therefore had no authority to enforce the settlement of 04-00315. This would mean that its judgment as to 04-00315 would have to be void as a matter of law. Case law supports voiding the district court's judgment in that circuits have reasoned that a federal court's duty to properly attach jurisdiction is so important that they some have held *" a judgment is void if the court that enters it lacks jurisdiction over either the subject matter of the action or the parties to the action." Williams v. Life Savings and Loan.* 802 F. 2d 1200, 1202 (10th Cir. 1986); *Nichols v. Southeast Health Plan of Ala,* 859 F. Supp. 553, 559 (S.D. Ala. 1993).

If the district court's judgment is void as to 04-00315 then its axiomatic that any subsequent judgment relying on it must also be void. If this Circuit defers to Congressional intent, and stare decisis then remand is mandated and no further inquiry is necessary concerning Appellant's other contentions that the district court improperly dismissed his two related Title VII actions.

2. This Circuit must realize that the Panel's failure to address the district court's failure to remand has left Appellant with no forum to seek relief and unnecessarily exposed Appellant to suit

The district court's failure to address the state law claims in Appellant's 05-00270 caused Appellant to file suit in state

court under the reasonable belief that since the district court did not dismiss his state claims in 05-00270 as it did in 04-00315 that it

was permissible for Appellant to pursue those and related claims in state court. The alternative was for Appellant not to file at all and risk ,as he waited for this Circuit's opinion on pending appeals, being barred by statues of limitations.

The City in turn filed a cross complaint against Appellant's alleged breach of the disputed settlement agreement in 04-00315, and prevailed on a motion for summary judgment after the state court took judicial notice, and applied res judicata to Appellant's state law claims because of the district court judgments in 04-00315. The state court has now directed the City to enter a judgment against Appellant in excess of $26,000.00 for alleged cost and attorneys fees which impermissibly include the cost of the City's defense of appeals to this Circuit. It's clear that the City is taking advantage of Appellant because he is in Pro Se.

It's also clear that if this Circuit does not intercede and apply the law as precedent mandates, and Congress intended that Appellant who has unquestionably been injured by parties named in 04-00315, and 05-00270, and already had two Title VII cases impermissibly dismissed will be subjected to irreparable harm.

As it now stands, because of the district court's failure to remand and the state court, and Circuit Panel's failure to recognize that it had the duty to do so, Appellant has been impermissibly denied any forum to seek relief and will likely have judgment entered against him in his state court case (*Morrow v. City of Oakland, et al.* RG-06250127) because a judgment that the district court never had lawful authority to render. The district court's bad decision has resulted in a chain of bad decisions and if allowed to stand will likely cause a riff in what appears to be consistent holdings from this Circuit concerning its strict interpretation of 28 U.S.C. 1447.

Appellant is aware of the fact that ordinarily this Circuit does not consider new issues raised for the first time in a petition for review. However, it does in extraordinary circumstances. *Escobar Ruiz v. INS* , 813 F 2d 1020 (9th Cir. 1988) (en banc). Appellant believes that the ongoing impairment of his rights in the state court has only occurred because of the district court's failure to remand, which may have been corrected had the Circuit Panel recognized that remand was necessary. Appellant believes that the new information concerning Appellant's pending state court proceedings constitutes an extraordinary circumstances and request that this Circuit take these facts into consideration.

3. The Panel's Opinion nullifies 28 U.S.C. 455, and departs from settled law, and Congress's intent to have federal judge's recuse themselves sua sponte from any proceeding where their impartiality might reasonably be questioned

28 U.S.C. 455 is commonly known as the " recusal statute." In pertinent part provision (a) reads:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Again, this Circuit's *Wilshire* holding obligated the district court to give full effect to every provision of 28 USC 455, and interpret it in the plain ordinary English in which its written. *Wilshire,* 881 f. 2d at 804.

Appellant notified the Panc, and this Circuit's Judicial Misconduct Committee that the district judge acted in a manner requiring recusal under 28 U.S.C 455(a), and that she failed to recuse herself. Neither the Circuit Panel or the Misconduct

Committee ever addressed this issue. Appellant relayed facts that would cause a reasonable observer to *reasonably question* the impartiality of the district court judge. Some of the facts include:

On June 15, 2004, Attorney Dennis Roberts wrote the judge a detailed letter complaining about the fact that on June 1, 2004, the Oakland City Council failed to approve the settlement of his client's case, the approval of which was a condition precedent in 04-00315, and 02-5358 necessary to give rise to both agreements being considered enforceable contracts.[3] In par. 4 of page 2 of the letter, though Roberts opens with the words of *"although this is not the proper time to try this case..."*

In the letter, Roberts provides a one sided account concerning triable issues about Appellant's alleged misconduct which improperly taints the judge's perception of the *Castaneda* case. Pursuant to ABA Judicial Canon 3 for attorney's, a lawyer is charged with not arguing privately with the judge as to the merits of a pending case, and deserves to be rebuked (which did not occur). Under 28 U.SC.C 455 (b) recusal is mandated when a judge has personal knowledge of disputed evidentiary facts concerning the proceedings gained during a one sided communications to the detriment of the other parties. *United States v. Microsoft Corp.*, 56 F 3d 1448 (D.C. Cir. 1995)

On June 16, 2004, in an uncontested e-mail sent to Appellant's former counsel, *Castaneda's* counsel Roberts stated the following:

" I will someday, not by e-mail, explain the situation between Marilyn (ref. presiding judge) and I." [4]

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[3] see Attach. 5 of Appellant's May 25, 2005 Motion for Sanctions 02-5358, docket 125-126 Cir. 05-17047

[4] June 16 2004 e-mail of Roberts (see pg. 2 Argument 1 of Appellant's May 25, 2005 Motion for Sanctions and Attachment 2 Case 02-5358, docket 125-126 Circuit 05-17047)

On August 9, 2004, at a proceeding for the *Castaneda* case, Dennis Roberts appears to have engaged in ex parte communications with the judge by way of providing her notes which none of the other

attorneys ever objected to.[5] attorneys ever objected to. After receiving and commenting on Robert's apparent ex-parte communication, the presiding judge stated the following:

" Maybe what I'll do is just recuse myself for a whole lot of reasons, anyway from this case, ultimately.[6]

At this proceeding, the judge revealed her intention to use the court's power to subpoena the Oakland City Council President, a member of an independent legislative body who along with other council members was named in Appellant's 04-00315, and charged with voting on the approval of monetary settlements of suits against the City. The judge used her power to subpoena the council president to court for the sole purpose of convincing him, and other council members to vote for a second presentation of the

[5] see pg . 37 Aug. 9, 2004 proceeding transcript 02-5358, docket 59 Cir. 05-17047

[6] see pg. 38 Aug. 9, 204 proceeding transcript 02-5358, docket 59, Cir. 05-17047

settlement of the *Castaneda Case,* and in effect relieve themselves of liability to Appellant in 04-00315. This was not only a misuse of the court's power to subpoena but an active act of advocacy on behalf of Appellant's adversaries who were in dispute with Appellant about whether or not the agreement he entered allowed a second presentation to the Oakland City Council. Further, on August 9, 2004, and throughout the district court proceedings, the judge allowed what should have been confidential information concerning the settlement agreements to be freely discussed in violation of the court's local rules which mandate that the assigned judge not be made privy to confidential settlement information. ADR Local Rules 7-1 through 7-5

- At the November 1, 2004 proceedings, held first for Appellant's 04-00315, then for *Castaneda's* 02-5358, pursuant to the judge's orders, Oakland City Council president Ignacio De la Fuentes, was present at the *Castaneda* proceedings. The verbal exchange between Appellant, the City, and the court at the proceeding for 04-00315 clearly demonstrated that by November 1, 2004, negotiations were still taking place concerning his case as evidenced by the court's invite for Appellant and the City to try to reach a settlement in his 04-00315 despite the fact that the district court had allowed the confidentiality of the negotiations to be violated.[13]

At the unrecorded settlement conference conducted for 04-00315, without benefit of a settlement judge, and with Appellant solely representing himself, the City insisted Appellant be bound by the terms of the April 20, 2004 agreement.

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[13] see pgs. 5-7 Nov. 1, 2004 proceeding transcript Case 02-5358 docket 73 Circuit 05-17047

Appellant disagreed and sought to negotiate a different agreement maintaining that the Oakland City Council's June 1, 2004 disapproval of the *Castaneda* settlement proposal nullified his April 20, 2004 agr ement, along with all its terms, and that any deal he

reached with the City constituted a new agreement subject to new terms.

The City maintained that Appellant be held to the same terms of the April 20, 2004 agreement, which resulted in the Appellant and the City not reaching any agreement on November 1, 2004.

Minutes later, a proceeding was held for the *Castaneda Case.* Despite Appellant's objections, and the fact that on June 1, 2004, the city failed to meet the precedent condition in both Appellant's and *Castaneda's* agreements, the judge who compelled the council president's attendance coerced him to vote for, and coerced him to urge other council members to vote for the settlement of the *Castaneda case.*

- Further, in addition to being apprised of what should have been confidential settlement information; and advocating for Appellant's adversaries by misusing the power of the bench to influence the outcome of what should have been an independent legislative process, the presiding judge made comments suggesting that she had a financial interest in the outcome of the controversy. For example she stated:

" I'm a taxpayer of the City of Oakland, so I don't like to see the City spending my money..... "[14]

Further, throughout the record of the August 9, 2004 proceeding, the judge commented about the cost that the city might incur if the *Castaneda* case proceeded. It was clear that the judge was a concerned tax payer of the city of Oakland. The judge's comments and actions demonstrated her failure to adhere to ABA Judicial Canon 3. The other concern is that under 28 USC 455 (b)(4) once the judge realized that she had a financial interest in the controversies she had a duty to recuse herself *sua sponte.*

Circuits have interpreted "financial interest" to refer to a direct interest, not a "remote or contingent" interest. *In Re Virginia Elec. & Power Co.*, 539 F. 2d 357, 366-67 (4th Cir. 1976). The court's comments indicate that she disagreed with the continuation of *Castaneda's* 02-5358, and Appellant's related 04-00315, and considered her interest as a tax payer to be direct to her pocketbook. The problem is that the Oakland City Council holds public meetings where citizens are allowed to give their input concerning the settlement of city related law suits prior to the Council making a final decision. The fact this process exist demonstrates that tax payers of the City of Oakland have the type of direct financial interest as described in *In Re Virginia.* If the presiding judge felt as strongly as she did she should have recused herself, and attended the council meeting like Appellant, and other tax payers did on December 5, 2004,so that like Appellant and other citizens, she would

[14] See pg. 7 Nov. 1, 2004 proceeding transcript Case 02-5358 docket 73, Circuit 05-17047

have had the opportunity to voice her opinion. Instead, the judge who admitted she probably should recuse herself circumvented this democratic process and used the power of the bench to directly put specific pressure on a key

council [member] to accept her position, and convince other independent city legislators to do the same in a manner that no other citizen of Oakland could do.

A. The Circuit Panel failed to realize that the district court's actions

On December 5, 2004, after much impropriety on the part of the court the Oakland City Council changed their original position and voted to settle the *Castaneda* complaint. The council president later publicized in the media that the judge made the council settle.

On August 29, 2005, at the final proceeding for the *Castaneda case*, and for Appellant's No. 05-00270, the judge who had refused to hear Appellant's Motion for appointment of *Cumis Counsel* in 02-5358 forced Appellant under penalty of contempt of court, with no legal counsel, to sign a settlement agreement in 02-5358, whose enforcement was erroneously advanced to extinguish Appellant's ability to bring 05-00270. Further problematic is the fact that Appellant had never reviewed the agreement with any legal counsel and the draft Appellant signed under duress was not consistent with the terms entered into the record on March 31, 2004 before the settlement judge, one of which was that Appellant first review and agree on the language of the written agreement.

Appellant maintains that the district court's influence of the city council and threatening contempt sanctions against Appellant for not signing a settlement agreement on August 29, 2005 were acts of duress and coercion. The problem is that *the court cannot coerce settlement. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F. 2d 648, 653 (7th Cir. 1989)

(also cited by this Circuit in *Disbio v. Bank of Oakland, et al.* 71 Fed. Appx. 760). Congress's intent of enacting 28 USC 355 was to maintain the integrity of the

judicial system by making recusal self executing when a judge's *impartiality might reasonably be questioned.* Other circuits have held that a litigant does not have to move for the judge's recusal. *Taylor v. O'Grady,* 888 F. 2d 1189 (7th Cir 1989). Similar to a judges's non-discretionary self executing duty under 28 USC 1447 to remand when necessary, a federal judge's duty under 28 USC 455 to recuse herself is also self executing and also imposes an ongoing duty upon the presiding judge to act when the circumstances are warranted. The district court judge that presided over Appellant's two Title VII cases didn't remand or recuse herself as circumstances described in statue required her to. Appellant believes that any reasonable observer armed with the facts would have reasonably questioned the district judge's impartiality. The Panel failed to realize that under the circumstances Appellant relayed, pursuant to 28 USC 455 recusal by the district court judge was not discretionary it was mandated.

4. The Circuit Panel incorrectly applied res judicata to the facts of Appellant's 05-00270

In *Kremmer* the Court held that in order to apply the doctrine of res judicata a court must first determine that the prior proceedings were full and fair. *Kremmer v. Chemical Contr. Corp.*, 456 U.S. 461, 483-84 (1982). Appellant presented the Panel with some of the following facts: For Example:

- The district court's refusal to hear Appellant's Motion to Quash in 02-5358 because Appellant, a named defendant had never been served or consented to removal in 02-5358-which made the district court lack personal jurisdiction;

The district court's refusal to hear Appellant's Motion for appointment of *Cumis Counsel* in 02-5358- which involvesAppellant's right to receive fair representation;

The district court's refusal to hear Appellant's Motion for "cause hearings" for restraining orders issued in violation of FRCP 65 in 02-5358 which involved Appellant's due process rights;

The district court's refusal to hear Appellant's Motion for Summary Judgment in 02-5358 which would have disposed of 02-5358 against Appellant and would have left Appellant's 05-00270 untouched;

The district court's refusal to hear Appellant's Motion for sanctions against attorneys engaged in misconduct in 02-5358- which involves the right to a fair and full hearing. Appellant believes that no reasonable person apprised of the facts herein would believe that the district court proceedings were full and fair.

CONCLUSION

The facts show that the district court did not have jurisdiction over 04-00315, that the Panel failed to realize it, and that bad decisions have been based on the district court's potentially voidable judgment. Appellant is not an attorney and admits perhaps he has not raised certain critical jurisdictional issues with the competence that an attorney may have (i.e. Appellant's seemingly delayed revelations to the district court that it had no personal jurisdiction over him in Case 02-5358[15]) however, Appellant understands that the court's duty to make sure litigants receive due process is so great that this Circuit has allowed jurisdictional errors to be raised at any time in the appeals process, including in a petition for rehearing. *Shabazz v. Carroll,* 833 F. 2d 149 (9th Cir. 1987); *Vun Cannon v. Breed,* 565 F. 2d 1096, 1097 (9th Cir. 1977).

[15] see Appellant's Motion to Quash case 02-5358, docket 162, Circuit 05-17047

For the reasons stated herein, Appellant respectfully request rehearing en banc, or in the alternative an order for all parties to participate in this Circuit's mandatory ADR program.

Dated: 9/9/2006 "S/_____"
rank Morrow Jr., Pro Se Appellant

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 19393
San Francisco, California 94119-3939
October 23, 2006

USDC, San Francisco
Northern District of California (San Francisco)
Federal Building
P.O. Box 36060
San Francisco, CA 94102

No.	Title	Agency/D.C. No.
05-15499	Morrow v. City of Oakland	CV-04-00315-MHP
05-1707	Castaneda v. Morrow	CV-02-05358-MHP
05-17061	Morrow v. City of Oakland	CV-05-00270-MHP

Dear Clerk:

The following document in the above listed causes are being sent to you under cover of this letter.

Certified copy of the Decree of the Court

The record on appeal will follow under separate cover. Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,
Cathy A. Catterson
Clerk of Court
" S/ "
By: Howard Hom
Deputy Clerk

Enclosure(s)
Cc: All Counsel

Appendix H-1

Before: GOODWIN, REINHARDT, AND BEA, CIRCUIT JUDGES

The panel has voted to deny appellant's petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal.

RAINS, LUCIA & WILKINSON LLP
ATTORNEY & COUNSELORS AT LAW

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February 14, 2003

Vicki Laden
Deputy City Attorney
Oakland City Attorney's Office
One Frank Ogawa Plaza, Sixth Floor
Oakland, CA 94612

Re: Morrow Grievance/
Appeal of I.A. finding

Dear Ms. Laden:

As you know, the Oakland Police Officers Association ("OPOA") is currently supporting Officer Frank Morrow's grievance appealing the findings in a recent Internal Affairs investigation concluding that the allegations in that case were "not sustained", moreover, no discipline followed. The grievance is now in the final phase of the appeal process.

Officer Morrow and the OPOA believe that a neutral third party reviewing the facts and circumstances surrounding the matter will completely " exonerate" him. Moreover, as discussed herein below, the mere fact that a complaint was made against Officer Morrow necessitates a formal opportunity to challenge the allegations.

I would like to confirm that the OPOA has an interest in engaging your office in a dialogue concerning the specifics of the Morrow grievance as well as other grievance/appeals which may be generated as a result of circumstances described in this correspondence. In order to provide you with additional information and relevant issues in greater detail, we have scheduled a meeting with you on Thursday February 20th, at 10:00 at your office.

You may recall that I had indicated to you that last year I represented an Oakland Police Officer that had been terminated, in part for excessive force. In that particular case, the City Attorney's Office introduced evidence of citizen complaints of excessive force which did not result in discipline. Unfortunately, and over my objection, the evidence was allowed into the record, and of significant import is the fact that the Arbitrator relied on these complaints in sustaining the termination. Your office argued that since the officer had seen the complaints, and therefore had actual knowledge of the documents, he could not object to their inclusion in the appeal The Arbitrator agreed.

Since the officer was never disciplined for the conduct, at the time he felt no need to grieve or respond to the complaints. Unfortunately, the complaints were not only relied upon, but one of the complaints was actually quoted by the Arbitrator to support the termination.

As indicated to you in one of our last conversations, the right to appeal adverse comments emanates from the Public Safety Officers' Procedural Bill of Rights (Government Code Section *3300 et seq.*) and the Appellate Court Decisions interpreting the same. Inn an attempt to facilitate our discussions regarding resolution of these issues, we have conducted research and analysis relative to the various issues. In that regard, the following should give you some sense of the

OPOA's position on various issues relating to this discussion.

The Right to File a Grievance

Appeals of punitive actions by employees represented by the OPOA are covered under the terms of Article IX of the Memorandum of Understanding ("MOU") between the City and the OPOA. Those procedures provide for an appeal to final and binding arbitration. As we will explain, a finding in an Internal Affairs investigation of " not sustained," and indeed any finding other than "exonerated," amounts to punitive action and therefore entitles the employee to an appeal.

A grievance is defined as, " ....any dispute which involves the interpretation or application of this agreement, or disciplinary action taken against an employee, or the application of the Personnel Rules, or the application of Departmental rules or orders." MOU Article IX-Grievance Procedure. Whether an employee is entitled to an appeal any finding in an Internal Affairs investigation involves a dispute regarding the application, interpretation, etc. of the MOU. It therefore constitutes a "grievance" as defined by the MOU. Moreover, any finding other than exonerated constitutes a "disciplinary action taken against an employee." Finally, a finding in an Internal Affairs investigation which results in the allegations being " unfounded" or " not sustained" necessarily involves the " application of Departmental rules or orders." Therefore, the OPOA may properly file a grievance regarding this dispute.

The Right to an Appeal of IA Findings

In the disciplinary appeal of the ex-police officer, referenced above, and decided on May 30, 2002, pursuant to

the MOU between the OPOA and the City of Oakland, the Arbitrator quoted from, and relied upon as a basis for his decision, a particular citizen's complaint that had been filed against the officer. In that regard, I have attached a redacted copy of the relevant pages from the "Decision and Award." Although you and I have identified the individual who was the subject of the appeal, in deference to his privacy, and in the context of these written communications I will not disclose his identity. That complaint never resulted in any discipline against the subject officer.

The City Attorney's Office also introduced evidence, over the officer's objection, the select indicator list relative to the officer's employment history at the Police Department which identified the complaint not resulting in discipline.

As you can see from the attached excerpt of the Award, the Arbitrator distinguished between difficulties which resulted in "discipline" versus "complaints from citizens." As previously noted, the Arbitrator actually quoted from one of those citizen complaints to support his finding of excessive force. It is thus readily apparent that complaints against officers, that do not result in discipline, may lead to discipline in subsequent matters.

Pursuant to the Public Safety Officers Bill of Rights Act, Gov. Code §§ 3300 *et seq.*, any officer subject to punitive action has a legal right to a full administrative appeal. Gov. Code § 3304; *Caloca v. County of San Diego*, 72 Cal. App. 4th 1209, 1223 (1999).

Government Code section 3304(b) states in pertinent part:

No punitive action....shall be undertaken by any public agency against any public safety officer....without providing the public safety officer with an opportunity for administrative appeal.

Government Code section 3303 defines "punitive action" as any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (emphasis added). The court in *Sacramento Police Officers Assn. v. Venegas,* 101 Cal. App. 4th 916 (2002), explained:

[E]ven though an adverse comment does not directly result in punitive action, it has the potential of creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action. [Citation] Id., at 926

Any police department's promotion process is usually extremely competitive. A single blemish on an officer's career can prevent the officer from advancing. Thus, any report sustaining findings of misconduct against an officer, which presumably would be included in the officer's personnel record, consequently would be given consideration in personnel decisions and could have an adverse impact on an officer's career.

The existence of any complaint against an officer, even one investigated and determined not to warrant discipline, *e.g.* a finding of "not sustained," still may lead to subsequent discipline. The conduct of the Oakland City Attorney and the arbitrator's decision referred to earlier makes this abundantly clear. From this, it is clear that the Police Department or the City will consider specific complaints in making personnel decisions pertaining to police officers and this consideration may lead to adverse action as defined in Government Code §§ 3303.

This very issue was considered in *Caloca v. County of San Diego, supra,* 72 Cal. App. 4th 1209. In *Caloca*, the court concluded that the ability that the reports of a citizen's review board have to adversely impact personnel decisions, entitled the officers who were the subject of those reports to an administrative appeal pursuant to § 3304(b). *Id.,* at 1221-1223. The court explained:

Although [citizen review bard]'s reports, findings of serious misconduct, and recommendations for discipline or policy changes are advisory only and [the citizen review board] has no authority to directly impose discipline against [the public safety offices], our focus is on whether [citizen review board]'s findings of misconduct constitute "punitive action" by a public agency as the term is defined under the Public Safety Officers Procedural Bill of Rights Act. Because [the citizen review board]'s findings are actions which may lead to adverse employment consequences, they are "punitive action [s]" within the meaning of the statute. The statute does not require a showing an adverse employment consequence has occurred or is likely to occur, merely that actions " may lead" to such a consequence." Id., 1223.

In *Hopson v. City of Los Angeles,* 139 Cal. App. Ed 347 (1983), the court determined that the report of the police commission, which concluded that the officers involved in a fatal shooting incident violated departmental policy and made serious errors in judgment, entitled the officers to an administrative appeal pursuant to § 3304(b). *Id.*, at 352. The court found that such a report, placed in the officers' personnel file, is punitive action under the Bill of Rights Act due to the potential adverse career ramifications in the report. *Id,* at 353.

In *Otto v. Los Angeles Unified School District,* 89 Cal. App. 4th 985 (2001), a peace officer received a memorandum

that counseled him on his failure to utilize department procedures. The memo also warned the officer that failure to follow the procedure in the future "could lead to future disciplinary action." The court concluded that this amounted to punitive action and entitled the officer to an administrative appeal. *Id.*, 999.

Based upon the impact that complaints may lead to punitive action, officers who are subjects of such complaints therefore are entitled to an administrative appeal pursuant to Government Code § 3304(b).

Conclusion

Based upon the City's conduct in the arbitration case referenced above and the resulting decision of the Arbitrator, the members of OPOA now face the real possibility that any type of adverse comment or finding which does not affirmatively exonerate them must be grieved to the fullest extent possible. The abundant legal precedent (some of which is cited hereinabove), supports the OPOA members right to appeal adverse comments in light of the outcome in the arbitration case referenced above, it would be imprudent not to do so.

In light of the above, we feel the City has two choices in this matter. The City can provide a full appeal, pursuant to the applicable terms of the MOU, for any officer who is the subject of any complaint (including complaints later determined to be unfounded, not sustained, or exonerated). Considering the number of complaints investigated by the Police Department the burden of providing appeals in all cases will in short order completely overwhelm the City and its ability to handle them in a timely manner.

On the other hand, the City can cease and desist from using complaints (internal or external) that did not result in any disciplinary action against an officer (including, but not limited to, complaints determined to be unfounded, not sustained, exonerated or frivolous) as the basis, in whole or in part, to support subsequent disciplinary action. Moreover, the evidence of such complaints would not be introduced into disciplinary proceedings involving the subject officer for any reason. Finally, the same complaints would not be used or considered for promotions, transfers or special assignments. In exchange, the OPOA would also agree to an abbreviated appeal process for such complaints/investigations that do not result in discipline.

In any event, I hope you now have a better appreciation of the concerns of the OPOA vis-à-vis the issues raised in this correspondence. There are of course certain limitations upon the City and the OPOA relative to curtailing administrative appeal rights of individual police officers. That being said, I believe that a dialogue with the City Attorney's office toward resolution of the Morrow Grievance and other issues raised herein would be in the best interests of all concerned. We look forward to meeting with you on Thursday February 20th , at 10:00 a.m.

Very truly yours,

Rains, Lucia & Wilkinson LLP

"S/_____"
Rocne A. Lucia, Jr.

RAL: sjs

cc: Bob Valladon, OPOA President
Frank Morrow